

## COPYRIGHT ARBITRATION ROYALTY PANEL

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HEARING

IN THE MATTER OF:

SATELLITE RATE ADJUSTMENT

DOCKET NO.

96-3 CARP-SRA

Friday,  
March 14, 1997

CARP Hearing Room LM414  
Library of Congress  
101 Independence Ave., S.E.  
Washington, D.C. 20540

The above-entitled matter came on for hearing,  
pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson

THE HONORABLE JOHN W. COOLEY

THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

APPEARANCES:On behalf of the Joint Sports Claimants:

PHILIP R. HOCHBERG, ESQ.  
Verner, Lipfert, Bernhard, McPherson & Hand  
901 15th Street, N.W.  
Washington, D.C. 20005-2301  
202/371-6244

The Office of the Commissioner of Baseball:

KATHLEEN A. BEHAN, ESQ.  
ROBERT ALAN GARRETT, ESQ.  
GARY GREENSTEIN, ESQ.  
STEVEN MARKS, ESQ.  
Arnold & Porter  
555 Twelfth Street, N.W.  
Washington, D.C. 20004-1202  
202/942-5444

On behalf of the Public Television Claimants:

MICHELE J. WOODS, ESQ.  
Covington & Burling  
1201 Pennsylvania Ave., N.W.  
P.O. Box 7566  
Washington, D.C. 20044-7566  
202/662-5347

On behalf of National Broadcasting Company, Inc.:

DIANE ZIPURSKY, ESQ.  
NBC, Inc.  
1299 Pennsylvania Ave., N.W.  
11th Floor  
Washington, D.C. 20004  
202/637-4535

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APPEARANCES: (CONT.)On behalf of Capital Cities/ABC, Inc.:

ROGER GOODSPEED, ESQ.  
ABC, Inc.  
77 West 66th Street  
New York, New York 10023-6298  
212/456-7593

On Behalf of Capital Cities/ABC, Inc.; NBC, Inc.; and  
CBS, Inc.:

CHARLES D. OSSOLA, ESQ.  
Lowe, Price, LeBlanc & Becker  
Suite 300  
99 Canal Center Plaza  
Alexandria, Virginia 22314-5503  
703/518-5393

On behalf of The Devotional Claimants:

BARRY GOTTFRIED, ESQ.  
Fisher, Wayland, Cooper, Leder & Zaragoza, LLP  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006-1851  
202/659-3494

and

JOHN H. MIDLEN, JR., ESQ.  
Chartered  
3238 Prospect Street, N.W.  
Washington, D.C. 20007-3214  
Washington, D.C. 20007-3214  
202/333-1500

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APPEARANCES: (CONT.)On behalf of American Society of Composers, Authors  
and Publishers (ASCAP):

BEVERLY A. WILLETT, ESQ.  
ASCAP  
One Lincoln Plaza  
New York, New York 10023  
212/621-6289

On behalf of Satellite Broadcasting & Communications  
Association:

PAUL GLIST, ESQ.  
JOHN D. SEIVER, ESQ.  
Cole, Raywid & Braverman, LLP  
1919 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
202/659-9750

On behalf of Broadcasters Claimants Group:

JACQUELINE DAVIS, ESQ.  
JOHN STEWART, ESQ.  
JESSICA HERRERA, ESQ.  
Crowell and Moring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
202/624-2500

On behalf of Prime Time 24:

C. TODD HARDY, ESQ.  
DYRA FISCHBECK, ESQ.  
Hardy & Ellison, P.C.  
9306 Old Keene Mill Road  
Suite 100  
Burke, VA 22015

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APPEARANCES: (CONT.)On behalf of National Rural Telecommunications  
Cooperative:

JOAN KEISER  
NRECA  
4301 Wilson Boulevard  
Arlington, VA  
703/907-5817

On behalf of Program Suppliers:

DENNIS LANE, ESQ.  
JOHN M. COLLINS, ESQ.  
Morrison & Hecker, LLP  
Suite 800  
1150 18th Street, N.W.  
Washington, D.C. 20036-3816  
202/785-9100

On behalf of Broadcast Music, Inc. (BMI):

MICHAEL J. REMINGTON, ESQ.  
GEORGE GALT, ESQ.  
Drinker, Biddle & Reath  
901 15th Street, N.W.  
Suite 900  
Washington, D.C. 20005  
202/842-8800

and

JOSEPH J. DiMONA, ESQ.  
Broadcast Music, Inc.  
320 West 57th Street  
New York, New York 10019  
212/830-2533

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APPEARANCES: (CONT.)On behalf of American Sky Broadcasting:

CHRIS MEYER, ESQ.  
MIKE KLIPPER, ESQ.  
Meyer & Klipper, PLLC  
Suite 803  
918 16th Street, N.W.  
Washington, D.C. 20006  
202/496-0830

and

CRAIG HOOVER, ESQ.  
JACQUELINE CLEARY, ESQ.  
KRISTIN DONOGHUE, ESQ.  
Hogan & Hartson  
555 13th Street, N.W.  
Washington, D.C. 20004  
202/6375600

On behalf of Library of Congress:

BILL ROBERTS, ESQ.  
Senior Attorney  
Office of General Counsel  
Copyright Office for Compulsory Licenses  
101 Independence Ave., S.E.  
Washington, D.C. 20540  
202/707-8380

ALSO PRESENT:

William Roberts, Copyright General Counsel, CARP  
Tanya Sandros, Administration, CARP  
Vivian Roque-Balboa, Administration, CARP  
Christine Walsh, Paralegal,  
Cole, Raywide & Braverman  
Jerry Parker, United Video Satellite Group  
Edwin S. Desser, Witness  
James Trautman, Witness  
Andy Paul, Senior Vice President, SBCA

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## C-O-N-T-E-N-T-S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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**James Trautman**

By Mr. Glist		239		275
By Mr. Stewart		265		
By Ms. Behan			269	

**Edwin Desser**

By Ms. Behan	280		511	
By Mr. Siever		353		531
By Mr. Ossola		499		

## E-X-H-I-B-I-T-S

<u>Exhibit No.</u>	<u>Description</u>	<u>Mark</u>	<u>Recd</u>
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Joint Sports

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P-R-O-C-E-E-D-I-N-G-S

(9:33 a.m.)

(Whereupon, the court reporter was duly sworn.)

CHAIRMAN GRIFFITH: There are just a couple of -- we have a full plate for today, as I understand, so we're going to try to take care of just a couple of things here. We'll be interested to hear when you're ready concerning any progress you've made with respect to scheduling, but I don't want to interrupt the testimony for that.

Have you made any decision, Mr. Glist, with respect to the Joint Sports Claimants' motion to amend?

MR. GLIST: Yes, Mr. Seiver will address that for us.

MR. SEIVER: John Seiver for the Satellite Carriers. In the rush to get the boxes out of here last night, I left the motion. I will do it at the break to compare it. I think that it's just ministerial and we'll have no problem with it, but I'd like to just check to make sure.

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1 CHAIRMAN GRIFFITH: That's fine, okay.

2 And we mentioned a list concerning the  
3 manner in which you intend to cross examine. That may  
4 not be a problem for us. We'll wait and see on that.  
5 With regard to the motion concerning Mr. Olson, what  
6 we're going to do at this time, ladies and gentlemen  
7 -- at this point, the motion is denied.

8 We are going to -- the CARP will determine  
9 the relevancy and the probative value of his testimony  
10 giving to it such weight as we deem appropriate. We  
11 will reserve to counsel, however, the right to renew  
12 this motion prior to the summation of rebuttal cases  
13 so that you're not put in a position of having to  
14 prepare that in the event that your motion is granted  
15 and any -- all or any portion of his testimony is  
16 indeed stricken.

17 All right; yes, Ms. Woods?

18 MS. WOODS: Your Honor, Michelle Woods  
19 from Public Television. On the matter of the  
20 schedule, I do have a proposed schedule here which I'd  
21 like to just distribute to everyone, let people get  
22 back to us with comments on it. We have shown it to

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1 the other parties.

2 CHAIRMAN GRIFFITH: Okay, great idea.  
3 Thank you, ma'am.

4 MS. WOODS: I should perhaps point out for  
5 the record that this is proposed by the Copyright  
6 Owners at this point and that the Satellite Carriers  
7 have not taken a definite position on it.

8 CHAIRMAN GRIFFITH: Okay, thank you.

9 MR. SEIVER: Your Honor, while Ms. Woods  
10 is passing that out -- John Seiver again.

11 We had spoken with the -- with Public  
12 Television who is the representative for the  
13 scheduling. And our concern about rebuttal is not  
14 knowing at this stage where we're going to be at the  
15 end of the case and what we might need, how much time,  
16 and whether this much time is necessary or -- who  
17 knows, we might need more.

18 And not knowing when we would actually  
19 conclude, we may be concerned about -- raise the  
20 concern about agreeing to this in stone ahead of time.  
21 I think the concept is possibly okay, but maybe we  
22 don't have the need for the follow up discovery

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1 requests, but we wanted to allow -- we wanted to make  
2 sure we have 30 days for the proposed findings and  
3 then at least another 15 days for replies to the  
4 proposed findings, wherever that -- however that fits  
5 in.

6 I didn't want to squeeze that out if in  
7 fact some of the dates were gone as well.

8 CHAIRMAN GRIFFITH: All right. Mr.  
9 Seiver, I'm going to let Judge Cooley work directly  
10 with you since he's on the scheduling.

11 Do you have any comments you want to make?

12 JUDGE COOLEY: Not at this time. I'd like  
13 to review this maybe on the break and then we can talk  
14 about this.

15 CHAIRMAN GRIFFITH: Talk about it later,  
16 all right.

17 Can we get on with Mr. Trautman then at  
18 this point?

19 Mr. Trautman, while you're coming up, sir,  
20 I will simply remind you that you've been previously  
21 sworn and you remain under oath, sir.

22 Whereupon,

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JAMES TRAUTMAN

was called as a witness, and after having been previously duly sworn, assumed the witness stand, was examined and testified as follows:

CROSS EXAMINATION (con't. from previous day)

BY MR. GLIST:

Q Welcome back, Mr. Trautman. Paul Glist again.

A Good morning.

Q Table A-1 to your direct case shows a sample cable package. And I believe that in your written testimony, you say that some cable networks were designed to appeal to a specific audience segment which was perceived to be under served by the broadcast channels available, is that correct?

A I'm not sure I used that specific language, but that would generally be correct.

Q Okay. If you want to confirm it, it's on page 15 of your direct.

My question is, you put under served in quotations, and I'm wondering what you mean by that?

A Well, offered types of programming that

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1 was not commonly offered or offered in quantity by  
2 broadcasters.

3 Q Would you say that broadcasters are using  
4 programming that tries to appeal to the great middle  
5 of the audience and they may tend to exclude the  
6 niches?

7 A Well, I think that broadcasters are trying  
8 to generate the largest possible audience.

9 Q And in doing that, do broadcasters tend to  
10 exclude niche audiences?

11 A No, I don't think so. I think that they  
12 obtain audience from across the spectrum of potential  
13 viewers.

14 Q So why did you use the example in direct  
15 that Black Entertainment Television would be serving  
16 an under served niche?

17 A Well, there are many black viewers of  
18 broadcast stations. In fact, many more black viewers  
19 of broadcast stations than of Black Entertainment  
20 Television. Black Entertainment Television serves a  
21 niche by appealing specifically to that audience.

22 Q So cable networks are focused on

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1 particular niches within the audience and make that  
2 their primary focus; is that what you're saying?

3 A Some do, yes.

4 Q The cable packages that you have as  
5 expanded basic for Denver in Table A-1, --

6 A Yes.

7 Q -- these packages are aggregations of  
8 cable nets that kind of aggregate these niches. Is  
9 that a fair statement?

10 A I'm sorry, the packages are aggregations  
11 of cable networks. Is that what you were asking?

12 Q That's part of what I'm asking. Perhaps  
13 we can start with that. Packages aggregate  
14 collections of cable nets. That's correct, isn't it?

15 A That is correct.

16 Q And in so doing, are they trying to  
17 deliver a niche program to meet various audience  
18 segments?

19 A Well, as I said, some of the services do,  
20 yes.

21 Q When a cable operator packages these  
22 services together, what is he attempting to do there?

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1           A       Well, he's attempting to maximize revenue.  
2       Maximize profit, actually.

3           Q       So he's driven to package this product  
4       together in order to maximize revenue?

5           A       Well, within his ability to do so under  
6       what regulatory requirements he has to meet, yes.

7           Q       Part of -- I thought part of your  
8       expertise was analyzing and critiquing various  
9       packaging strategies for cable operators. Did I  
10      misunderstand that?

11          A       No.

12          Q       And so would you say that cable operators  
13      maximize their revenues by selling packages of  
14      programming rather than individual channels?

15          A       Well, I think that in some instances,  
16      packages are used to maximize revenue. In other  
17      instances, the reason that channels aren't offered in  
18      various packages other than the structure that you  
19      currently see is attributable to technical limitations  
20      associated with billing systems and things of that  
21      nature.

22          Q       Do you think that the primary reason is

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1 revenue maximization?

2 A That's --

3 MS. BEHAN: Objection.

4 I don't understand that question. The  
5 primary reason for what?

6 MR. GLIST: The primary reason for  
7 packaging. He's given me two reasons.

8 THE WITNESS: Well, a primary reason for  
9 packaging, but there are many different potential  
10 approaches to packaging. And some approaches like  
11 offering subsets of packages within a basic package  
12 are difficult for many cable operators to execute  
13 because of technical or primarily billing system  
14 limitations.

15 BY MR. GLIST:

16 Q Would you agree with the sentiment that  
17 unlike broadcasting which focuses on the success of a  
18 single channel, the success of cable depends on  
19 putting together a package of many channels?

20 A Well, I would say that the success of  
21 cable depends on being able to assemble a product  
22 offering that is attractive to subscribers.

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1 Q Do you have no opinion on whether this  
2 success depends on putting together a package of many  
3 channels?

4 A I think that to the extent that a number  
5 of channels that can be offered will attract  
6 subscribers, the characterization "many" is not  
7 necessarily correct.

8 Q Would it surprise you to know that Mr.  
9 Bortz has testified in distribution as follows:

10 "When I'm working with a broadcaster and  
11 I'm in a geographic area, that broadcaster's concern  
12 is one channel, the programming on that one channel.  
13 His revenues, his business is derived from the success  
14 of that single channel.

15 "But I just described for cable operators  
16 something that is a totally different business. His  
17 success comes from putting together a package of many,  
18 many channels that will encourage people to subscribe  
19 and to pay a monthly fee."

20 Is that a fair statement?

21 MS. BEHAN: Objection.

22 He hasn't provided us with a copy of the

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1 statement. Under traditional rules of completeness  
2 plus under the rules of this panel, I think we should  
3 get a copy of whatever it is that he's referring to.  
4 And the witness should be shown it to understand what  
5 the context was.

6 CHAIRMAN GRIFFITH: Do you want to  
7 respond, sir?

8 MR. GLIST: I'm happy to show it to them  
9 subject to check, but I was asking for a reaction to  
10 the sentiment expressed. I'd be happy to show it to  
11 Ms. Behan as well.

12 MS. BEHAN: Well, because he is using it  
13 as testimony from a panel, I'd like to look at it.

14 CHAIRMAN GRIFFITH: Okay, please.

15 THE WITNESS: And I don't disagree with  
16 this statement. What I was intending to say  
17 previously is that the packaging options available to  
18 the cable operator could include multiple packages  
19 within a package. Certainly the packages that they  
20 assemble would tend to include more channels than this  
21 single channel that a broadcaster offers.

22 BY MR. GLIST:

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1 Q Do you know if most cable customers take  
2 their cable offerings in packages?

3 A Yes, they do.

4 Q During your oral direct, there was a chart  
5 that was up here as a visual aid. I wonder if I could  
6 bring it back up because I had a question about it.

7 MS. BEHAN: Which one?

8 MR. GLIST: I'll show you this small --

9 BY MR. GLIST:

10 Q Now, sir, this was not part of your direct  
11 testimony, was it?

12 A Well, it was referred to in my testimony  
13 yesterday.

14 Q In your written direct?

15 A No.

16 Q It's a visual aid that --

17 A Yes.

18 Q -- you referred to orally?

19 A That's correct.

20 Q I noticed that you show only seven basic  
21 cable nets on this visual aid. That's not the  
22 universe of cable networks, is it?

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1           A       No, it's not. As I mentioned yesterday,  
2       there are more than a hundred.

3           Q       Do you know how many cable networks there  
4       are -- there were in 1988?

5           A       I wouldn't know the exact number, no.

6           Q       1992?

7           A       No; although I would imagine that it was  
8       more than in 1988.

9           Q       Would you say there's been a dramatic  
10      increase in the number of cable networks since 1988?

11          A       Well, there's been an increase in the  
12      number of cable networks. There has been much less of  
13      an increase in the number of cable networks carried.

14          Q       On cable?

15          A       Yes.

16          Q       How about on DBS?

17          A       On DBS, many networks are carried.

18          Q       Would you say that DBS has added more  
19      cable networks than broadcast stations since 1992?

20          A       Since 1992?

21          Q       Uh-huh.

22          A       Well, certainly; because it started from

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1 zero. Yes, it carries more cable networks than it  
2 does broadcast stations.

3 Q In your oral testimony, you mentioned that  
4 WTBS was available in C-band for \$2.25.

5 A Yes.

6 Q Isn't WTBS also packaged in various DTH  
7 packages?

8 A Yes, it is.

9 Q So on Table A-2, for example, WTBS is part  
10 of the DirecTV package that you quote from?

11 A It's part of the -- it's first available  
12 in the select choice package.

13 Q In the 1995 package?

14 A Yes.

15 Q And on Table A-3, is WTBS part of the  
16 \$17.95 package?

17 A Yes, along with some other super stations,  
18 yes.

19 Q Do you think that most DBS customers take  
20 their satellite programming in packages?

21 A DBS customers?

22 Q Yes.

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1 A Yes, I believe that they do.

2 Q Table A-1 also reflects premium services  
3 like HBO. These premium services, I think you  
4 testified, are different from basic cable networks?

5 A Yes, they're different in the way that  
6 they're sold.

7 Q Are they different in content?

8 A They're -- yes, they are different in some  
9 ways in content, yes.

10 Q For example, --

11 A Well, they typically are -- the most  
12 common services or the most subscribed to are movie  
13 services.

14 Q And those are generally commercial free?

15 A Yes.

16 Q Whereas cable networks are typically --  
17 they bear advertising?

18 A Some don't, but most do; yes.

19 Q On page 15 of your testimony, you list  
20 certain cable networks as among the most prominent.

21 A Yes.

22 Q And did I hear you correctly on your oral

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1 direct that you define that as widely distributed?

2 A Well, that's the basis for the order in  
3 which they're listed on this table.

4 Q Would you say that a cable network that is  
5 over 50 or 55 million subscribers would be considered  
6 widely distributed?

7 A I would agree with that, yes.

8 Q Now you also identify on this table that  
9 there are certain -- there's certain programming that  
10 is contained within these networks. For example, for  
11 Cable News Network, you characterize it as 24 hour  
12 news programming.

13 A Yes.

14 Q There are other cable networks, aren't  
15 there, that also fit that description?

16 A Of 24 hour news programming?

17 Q Fox News, for example?

18 A Yes, there are.

19 Q Now is there any reason not to list other  
20 widely carried services like the Weather Channel on a  
21 list like this?

22 A Well, I was simply trying to keep the list

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1       manageable.     I mean, these services within the  
2       industry are commonly referred to as -- sometimes even  
3       referred to, with the exception of C-Span which has  
4       extensive distribution, perhaps for some other reasons  
5       -- the remaining services on these lists are commonly  
6       referred to as the top ten or 12 services defined  
7       within the industry.

8               Q       But within --

9               A       It's generally accepted.

10              Q       Within the definition that you offered of  
11       widely distributed to more than 50 or 55 million,  
12       would you say that the Weather Channel satisfies that  
13       criterion?

14              A       Yes, it's not as widely as distributed as  
15       these services, but it's close.

16              Q       Do you know how many subs they reach?

17              A       Not exactly, but it's at least 50 to 55  
18       million.

19              Q       Do you think 64 million; is that a fair  
20       estimate?

21              A       It wouldn't -- that's probably correct.

22              Q       How about QVC?

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1           A       I'm familiar with QVC.    It's a home  
2 shopping service.

3           Q       Is that widely distributed?

4           A       Yes, it is. Again, less widely than those  
5 on this list.

6           Q       Do you think that 57 million subs is a  
7 fair estimate for QVC?

8           A       That would seem about right.

9           Q       Now on the next page of your direct, you  
10 state that license fees can be a few cents or even  
11 free.

12                   Do you see where I am?

13           A       Yes.

14           Q       Now, can't license fees also be negative?

15           A       Well, you need to explain what you mean by  
16 negative.

17           Q       The consideration flows from the  
18 programming to the cable system.

19           A       Well, I don't -- I'm not aware of any  
20 situation beyond certain initial payments to obtain  
21 distribution where a license fee is paid on an ongoing  
22 basis to the cable operator.

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1 Q How about shopping channels like QVC?

2 A They do share a percentage of the shopping  
3 revenue, the retail sales that they generate within  
4 the operator's market with the operator.

5 Q So they pay the operator based on sales in  
6 that operator's market?

7 A That's correct.

8 Q And that would include QVC?

9 A Yes, QVC is a shopping channel that does  
10 that.

11 Q You also mentioned in your answer a moment  
12 ago that there are initial payments that are also made  
13 by cable networks to cable operators and that could be  
14 part of the overall economic transaction. Is that  
15 what you're talking about?

16 A Well, it could be in the case of a few  
17 newer networks that are seeking to obtain  
18 distribution. And the reason for that is because the  
19 cable operator has very limited channel capacity, and  
20 therefore there are many services competing for  
21 perhaps only one channel slot on a cable system.

22 Q Well, let's take Fox News as an example.

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1 Fox News is positioned to deliver 24 hour news like  
2 Cable News Network.

3 A Yes.

4 Q Isn't it true that Fox News has offered  
5 ten dollars or more per sub to cable systems for  
6 initial carriage?

7 A They have offered a sum in that range, and  
8 in return they will receive a substantial license fee  
9 from the beginning of their distribution.

10 Q And do you know what the license fee is at  
11 the top of the rate card?

12 A I'm not certain the top of the rate card  
13 fee over the course of the contract. I believe it  
14 starts at around 25 cents.

15 Q So the cable operator would pay 25 cents  
16 to Fox News, but Fox News would pay ten dollars to  
17 launch to the cable operator?

18 A Twenty-five cents per month, and  
19 continuing in essence and probably increasing in  
20 perpetuity as long as they're carried.

21 Q Are you familiar with a service called  
22 Animal Planet?

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1 A I am familiar with the service, yes.

2 Q Is it fair to say that Animal Planet has  
3 made a similar offer to the cable industry?

4 A Well, they certainly aren't paying that  
5 level of up front fee.

6 Q How about five dollars a sub; does that  
7 sound right?

8 A I've seen reports that high. I'm not sure  
9 that it's consistently that high.

10 Q Now, isn't it correct that there is  
11 another aspect of the financial relation between  
12 license fees of the cable network and the cable  
13 operator having to do with the availability of local  
14 avails? You testified to this on page 17.

15 A Yes, most of the basic cable networks do  
16 sell or do make available a certain amount of their  
17 time to the cable system for local advertising.

18 Q And you've testified that on average it's  
19 about two minutes an hour?

20 A Yes, about 20% of their total time which  
21 is usually about two minutes.

22 Q And sometimes it can be higher than that,

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1 maybe sometimes a little lower?

2 A That would be fair.

3 Q And is it fair to say that a cable network  
4 that makes time available for sale to a cable system  
5 is conventionally known as an insertable network?

6 A Yes, that's fair enough.

7 Q Okay, when a cable operator contracts with  
8 an insertable network, is the availability of two  
9 minutes of advertising availabilities part of the  
10 economic equation for licensing?

11 A Well, it depends if they plan to insert on  
12 it.

13 Q But if the cable operator has a sales  
14 department for selling time locally, then he would  
15 make use of that, no doubt?

16 A Not no doubt at all. In fact, operators  
17 are usually limited in the number of channels that  
18 they can insert on. So on many channels, they don't  
19 insert at all.

20 Q But would you say that ESPN and CNN are  
21 services that are considered premiere insertable  
22 networks for local ad sales?

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1           A       Operators would usually insert on those  
2 channels, yes.

3           Q       Now when the TCI cable system in Denver  
4 carries the Denver broadcast stations, are those  
5 stations insertable to the cable operator?

6           A       No, they're not.

7           Q       In fact, the cable operator cannot alter  
8 that signal at all, can he?

9           A       No, they cannot.

10          Q       When a DBS system carries broadcast  
11 signals, are those broadcast signals insertable?

12          A       No.

13          Q       Now, I want to ask you about another  
14 aspect of this licensing arrangement.

15                   Do the cable networks ever provide equity  
16 positions to cable operators as part of a carriage  
17 deal?

18          A       There are some arrangements where cable  
19 operators have equity in channels. It's not common  
20 currently for an operator to trade equity for  
21 distribution.

22          Q       Well, let's take a look at your Table A-1.

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1 You list ETV as one of the cable nets carried in  
2 Denver. Does TCI have an equity position in E?

3 A They have a small equity position. I'm  
4 just trying to find E.

5 Q Do you know what it is?

6 A I believe about 10% of it.

7 Q And when E contracted with other MSO's  
8 like Continental, Comcast, or Cox, did they get equity  
9 positions?

10 A Well, E was -- I don't think that it's  
11 fair to characterize that as equity positions obtained  
12 in return for distribution. E was launched as a  
13 service owned by these companies.

14 Q So the cable networks are related by  
15 equity positions to some of these cable systems that  
16 are paying fees?

17 A Well, to the multiple system operators,  
18 yes; some of them have ownership interest in  
19 programming.

20 Q And how about Discovery; is that  
21 affiliated with cable systems?

22 A Yes, one of its owners is TCI.

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1 Q How about BET?

2 A Yes, it has some ownership.

3 Q How about the Family Channel?

4 A Again, yes.

5 Q Bravo?

6 A A smaller operator, but yes.

7 Q Headline News?

8 A Yes.

9 Q CNN?

10 A Yes.

11 Q TNT?

12 A Yes.

13 Q Court TV?

14 A Yes.

15 Q So part of the economic relationship  
16 between cable networks and cable systems may include  
17 equity relations, is that correct?

18 A No. It's the multiple system operators  
19 and their programming organizations that own the  
20 equity interest in the programmers. For example, TCI  
21 has a separately traded subsidiary known as Liberty  
22 which manages and is responsible for its programming

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1 interests.

2 Q The TCI system in Colorado which you  
3 attach as your sample system is owned by the MSO which  
4 has equity positions in many of the cable nets that  
5 you and I just reviewed, isn't that true?

6 A Through its Liberty subsidiary, yes.

7 Q If a DBS carrier uplinks WGN, does WGN let  
8 the satellite carrier take an equity position in the  
9 station?

10 A It doesn't in that instance, no.

11 Q Now we also talked yesterday about the  
12 actual satellite transport of a DBS system. When ESPN  
13 sells its service to a cable system, does the cable  
14 system provide the satellite or does ESPN?

15 A ESPN provides -- well, ESPN leases space  
16 on a satellite.

17 Q When a DBS carrier uplinks a broadcast  
18 signal, does the broadcaster provide the satellite?

19 A I'm sorry, could you repeat the question?

20 Q When a DBS carrier uplinks a broadcast  
21 signal, does the broadcaster provide the satellite or  
22 does the DBS carrier?

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1           A       Well, the broadcaster is already on a  
2       satellite which they have leased, and then it's  
3       brought down by the DBS company and sent back up to  
4       the DBS satellite.

5           Q       I thought we determined yesterday that the  
6       broadcaster is not the one uplinking, that there is a  
7       third party carrier.

8           A       You're correct; I'm sorry.

9           Q       So to make sure we're clear, ESPN provides  
10      the satellite transport; broadcast signals on DBS do  
11      not, is not correct?

12          A       That's correct.

13          Q       Could you take a look at Table 1 of your  
14      direct testimony, please?

15                   During your oral direct examination, you  
16      were asked whether the total revenue column in this  
17      table included DBS revenue. Do you recall that  
18      question?

19          A       Yes.

20          Q       And did you answer --

21                   CHAIRMAN GRIFFITH: Let me interrupt you.  
22      Where -- which table; Table 1 or A-1?

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1 MR. GLIST: Table 1, page four.

2 CHAIRMAN GRIFFITH: Page four, thank you.

3 BY MR. GLIST:

4 Q Do you recall your answer?

5 A I believe I said that I -- that it did.

6 Q So let's take Time Warner as an example.

7 Is it -- you're not saying that the difference between  
8 total revenue and cable revenue in Time Warner is all  
9 DBS, is it?

10 A No, I'm not. Time Warner has many assets.

11 Q Now if we look at an MSO like Continental  
12 which you have listed as an owner of Primestar, --

13 A Yes.

14 Q -- there is no difference shown between  
15 cable revenues and total revenues. Would that suggest  
16 to you that they received zero revenues from their DBS  
17 venture?

18 A Well, I know that that's not correct, so  
19 it's clear that the estimate of cable revenues is not  
20 properly accounting for that.

21 Q So this table stands in need of some  
22 correction?

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1           A       Well, in that instance, I believe that  
2       would be correct.

3           Q       Let's go to Table 2 on --

4           A       It may very well be that in this instance  
5       those would be reported under a separate subsidiary of  
6       Continental. It's possible. I'm not aware of that.  
7       I'm sure that that's the case, for example, in the  
8       case of Cox Cable Communications which has a number of  
9       separately traded -- or separate interests in  
10      broadcast stations and the like as well as satellite.

11          Q       I see. So the total revenue column here  
12      may not reflect anything having to do with DBS?

13          A       I believe that it does in most instances.  
14      In those instances, it may not.

15          Q       The instances like Comcast, Cox?

16          A       The ones I referred to were Continental  
17      and Cox.

18          Q       Continental and Cox. Okay, let's go to  
19      Table 2 on page seven.

20                    You list USSB on this table. Does USSB  
21      use the compulsory license?

22          A       I don't believe that they carry any

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1 broadcast stations.

2 Q So they're on this profile just --

3 A Because they are a direct broadcast  
4 satellite service provider.

5 Q I see. But they're not implicated in this  
6 compulsory license proceeding?

7 A Well, I don't know what you mean by  
8 implicated, but I don't imagine that they're directly  
9 affected by it.

10 Q Mr. Trautman, thank you for staying over.  
11 I think that's all the questions that I have for you  
12 at this time. There may be other counsel with  
13 questions.

14 CHAIRMAN GRIFFITH: Are there any counsel  
15 with questions?

16 MR. STEWART: John Stewart for the  
17 Broadcasters Claimants.

18 I would request to ask a short series of  
19 questions of this witness on further cross directed to  
20 a single point that Mr. Glist raised yesterday in his  
21 cross.

22 CHAIRMAN GRIFFITH: All right.

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1 MR. STEWART: Good morning, Mr. Trautman.

2 THE WITNESS: Good morning.

3 CHAIRMAN GRIFFITH: Say your name once  
4 more for the reporter, please.

5 MR. STEWART: I'm John Stewart, and I'm  
6 here representing the Broadcaster Claimants Group.

7 CROSS EXAMINATION

8 BY MR. STEWART:

9 Q Do you recall yesterday that Mr. Glist  
10 asked you during cross examination about whether --  
11 what the cost to a broadcaster would be of reaching an  
12 additional viewer?

13 A Yes.

14 Q And your response was something to the  
15 effect that well, there might be promotional costs,  
16 but you were unaware that there would be an capital  
17 costs, is that right?

18 A Yes.

19 Q Now it is the case, is it not, that  
20 broadcasters make significant capital investments in  
21 order to put a station on the air to reach viewers for  
22 the first time?

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1 A Absolutely, yes.

2 Q In other words, they don't simply buy  
3 programming; they also make capital expenditures and  
4 install capital assets in order to distribute those  
5 programs to the viewers?

6 A That's right; they construct production  
7 and transmission facilities and the like, which is a  
8 significant investment.

9 Q And when a station is acquired, the buyer  
10 acquires the capital assets that allow it to  
11 distribute those programs to viewers as well, is that  
12 right?

13 A That's correct.

14 Q Now are you also -- are you aware that  
15 broadcasters on occasion expend -- invest capital  
16 amounts in order to improve their signal or to expand  
17 the area within which their signal can be received?

18 A Yes, they do that.

19 Q So, for example, they might build a taller  
20 tower, is that right?

21 A That's correct.

22 Q Or they might install a new transmitter or

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1 a new kind of transmission antenna, is that right?

2 A That's correct.

3 Q They might expend funds -- capital funds  
4 to increase the power with which they broadcast, is  
5 that right?

6 A That's correct.

7 Q They also might sometimes build a repeater  
8 or a translator to improve reception or to fill in an  
9 area where reception is poor, is that right?

10 A That's correct.

11 Q They also might -- in fact, many  
12 broadcasters install ghost canceling technology. Are  
13 you aware of this?

14 A I'm familiar with that, yes.

15 Q And that allows newer receivers to receive  
16 an improved picture, is that right?

17 A That's correct.

18 Q And it's also the case, is it not, that  
19 broadcasters, with respect to the programs they  
20 create, invest in capital assets such as cameras and  
21 production facilities to produce and deliver a  
22 superior signal, is that right?

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1           A       That's correct.

2           MR. STEWART: I have no further questions.

3       Thank you.

4           CHAIRMAN GRIFFITH: All right, thank you.

5           Any other counsel for cross examination?

6           All right.

7           MS. BEHAN: Can we take a few minutes  
8       before redirect?

9           CHAIRMAN GRIFFITH: Five minutes?

10          MS. BEHAN: Yes, thank you.

11          CHAIRMAN GRIFFITH: All right, request  
12       counsel take just a five minute recess before  
13       redirect.

14               (Whereupon, the foregoing matter went off  
15       the record at 10:12 a.m. and went back on  
16       the record at 10:23 a.m.)

17          CHAIRMAN GRIFFITH: All right, ladies and  
18       gentlemen, before we have the redirect, I would like  
19       to have Judge Gulin comment on one of the motions,  
20       please.

21          JUDGE GULIN: Well, we just wanted to let  
22       counsel know that we have ruled on the motion in

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1 limine of ASkyB. We're denying that motion. Counsel  
2 for ASkyB certainly are welcome to be present or not  
3 to be present for the remainder of the proceedings.  
4 The written testimony as it's already been presented,  
5 of course, cannot be materially supplemented.

6 If ASkyB wishes to be present to ensure  
7 that that's the case and voice objections, they're  
8 welcome to do so. Frankly, we do not intend to sua  
9 sponte, raise objections on behalf of ASkyB, but the  
10 opinion of the Panel is that it's not necessary to  
11 grant that kind of a motion because the parties are  
12 bound by the rules of not being permitted to  
13 supplement materially their written testimony.

14 And a written order will follow.

15 CHAIRMAN GRIFFITH: Thank you.

16 Ms. Behan?

17 REDIRECT EXAMINATION

18 BY MS. BEHAN:

19 Q Mr. Trautman, I just have a very few  
20 questions for you.

21 A Okay.

22 Q First of all, I'd just like to clarify

1 something for the record.

2 I think that you said that you did not  
3 believe that broadcast stations on DBS were  
4 insertable?

5 A I did state that, yes.

6 Q Okay, when you stated that, were you aware  
7 of the fact that some of the network affiliates that  
8 are carried over DBS are insertable and do insert ads?

9 A I was not aware of that, no.

10 Q Okay. All right, now Mr. Glist, and just  
11 this morning, talked about a number of cable networks.  
12 And he went through your chart and discussed some that  
13 were in and some that were not in your chart.

14 I'd just like to review. He also talked  
15 briefly about some of the financial relationships  
16 between the cable networks and the cable operators,  
17 okay?

18 A Yes.

19 Q Do you recall that he talked about that  
20 with regard to quality as QVC?

21 A Yes, I do.

22 Q Okay. Now does QVC, in your view,

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1 resemble in any way a broadcast station like the ones  
2 that are being compensated for in this proceeding?

3 A No, it does not.

4 Q Okay, can you explain why?

5 A Well, it is a home shopping service and  
6 again really is a niche programming service not  
7 intended to provide a general entertainment service to  
8 general audiences.

9 Q Okay. What about the Weather Channel;  
10 does that look like a broadcast station?

11 A No, it does not. Again, the Weather  
12 Channel provides 24 hours of weather programming,  
13 weather information; and is a special interest channel  
14 not intended to attract a broad audience.

15 Q What about Fox News?

16 A Similarly, Fox News is a 24 hour news  
17 channel; again, a niche service focused specifically  
18 on news programming.

19 Q Okay, and then finally, what about Animal  
20 Planet?

21 A Again, Animal Planet, a service offering  
22 primarily nature programming which is again targeted

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1 to a specific niche audience and not intended as a  
2 general entertainment channel.

3 Q Okay. Now Mr. Glist yesterday talked a  
4 lot about the royalties that cable operators were paid  
5 under Section 111 of the Copyright Act. Do you recall  
6 that testimony?

7 A Yes, he did.

8 Q Okay. Now, do you understand something  
9 about how those royalties are paid by the cable  
10 operators?

11 A Yes, I do.

12 Q Okay. Do you understand that they may  
13 vary the royalties paid depending on the charge that  
14 the cable operator pays -- charges for basic service  
15 as well as the number of signals carried?

16 A Yes, I do.

17 Q Okay.

18 A I understand that to be the case.

19 Q Can you briefly explain what you mean by  
20 that in terms of the fact that they vary?

21 A Well, operators pay a percentage of  
22 revenue for each -- some specified percentage of their

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1 basic revenue for each channel that they -- each  
2 distant broadcast station that they offer. And the  
3 percentage varies depending on the number and type of  
4 service -- stations that they offer.

5 Q Okay. Well, now can you go to Table A-2  
6 in your appendix and go to the DirecTV programming  
7 line.

8 A Yes.

9 Q All right, for WTBS, is WTBS one of the  
10 independent broadcast stations that is compensated  
11 under this proceeding?

12 A Yes, it is.

13 Q And is it also compensated for the cable  
14 proceedings under 111?

15 A Yes, it is.

16 Q Okay. And what is the license fee that  
17 DirecTV -- the cable operator will pay carrier WTBS?

18 A Well, based on the package that it is  
19 offered by DirecTV, the select choice package, the fee  
20 that a cable operator would pay under Section 111 for  
21 WTBS would be approximately 18 cents per month.

22 Q Okay. And can you briefly explain how you

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1 would compute that?

2 A Well, in essence, the operator would have  
3 to pay roughly 9/10 of a percent of the revenue  
4 generated by the tier on which the service -- on which  
5 the station is carried. So you would have to pay 9/10  
6 of 1% of the \$19.95 per month fee that we see here for  
7 select choice.

8 Q All right, now if you go to Table A-3 and  
9 you look at Superstar.

10 A Yes.

11 Q Do you see that there are -- on the super  
12 view package, are there a number of distant broadcast  
13 super stations?

14 A Yes, there are four of them; two, KTLA and  
15 WTBS on the first page; and two more, WGN and WPIX at  
16 the top of the second page.

17 Q Okay, now if this were a cable package,  
18 what would the cable operator pay to carry these four  
19 signals?

20 A Well, the total fee for the four signals  
21 would add up to approximately 9% of the revenues  
22 generated from that package which works out to about

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1 \$1.60 per month in total or about 40 cents per channel  
2 per month -- per subscriber per month.

3 Q Okay, so again, to summarize, for these  
4 four distant broadcast stations, they are all  
5 broadcast stations that are compensated for through  
6 this proceeding?

7 A Yes, they are.

8 Q And if this were a package that was being  
9 compensated for in the 111 proceeding, the four  
10 channels would command \$1.60 in fees?

11 A In total, yes.

12 MS. BEHAN: That's all I have.

13 CHAIRMAN GRIFFITH: All right.

14 MR. GLIST: I may have a short recross.

15 CHAIRMAN GRIFFITH: Okay.

16 MS. BEHAN: I would say that I don't  
17 believe it went beyond the scope of cross examination.  
18 He did go into the license fees, but --

19 CHAIRMAN GRIFFITH: Let's see.

20 RECROSS EXAMINATION

21 BY GLIST:

22 Q In the sample cable television system

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1       which you have appended to your testimony, the basic  
2       service of retransmitting broadcast signals is  
3       separated from the carriage of most cable nets, isn't  
4       that correct?

5               A       I'm sorry, you're referring to the  
6       broadcast basic service?

7               Q       Yes.

8               A       Yes, it is.

9               Q       And partially you have testified that's a  
10      response to legislation, but the effect is that the  
11      revenue based on which cable pays would be \$9.90  
12      instead of the \$17 or \$19 dollar package rate in DBS?

13              A       Well, in this instance, the services that  
14      the cable operator carries -- the distant broadcast  
15      services that the cable operator carries are on the  
16      part of this basic service package that's \$9.90 per  
17      month.

18              Q       And so the 1½% that you testified to  
19      yesterday would be applied to the \$9.90, is that  
20      correct?

21              A       For this cable operator, yes.

22              Q       Now when you calculated what a satellite

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1 carrier would pay if it had not structured its rates  
2 in this way under Section 111, you counted four  
3 distant independent signals, is that correct?

4 A I counted four distant independent signals  
5 for the super star packager, yes.

6 Q Isn't it correct that in the cable  
7 television license, the first distant signal  
8 equivalent is at about 9/10 of 1% to this two -- the  
9 second, third -- the second signal goes down, is that  
10 correct?

11 A The second signal is compensated at about  
12 6/10 of 1%.

13 Q Right. But after some point, a cable  
14 television operator runs into a 3.75 penalty  
15 assessment, doesn't he?

16 MS. BEHAN: I object to the use of the  
17 term penalty.

18 MR. GLIST: At 3.75% --

19 CHAIRMAN GRIFFITH: I'm sorry, I didn't  
20 hear.

21 MS. BEHAN: I object to the use of the  
22 term penalty.

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1 CHAIRMAN GRIFFITH: All right, do you want  
2 to rephrase that, please?

3 BY MR. GLIST:

4 Q At some point, the cable operator runs  
5 into a 3.75% of gross assessment, is that correct?

6 A That's correct.

7 Q Do you know how many cable television  
8 operators pay that assessment?

9 A I know that some do. I don't know how  
10 many.

11 Q So -- and the 3.75% assessment is the one  
12 that you used in calculating the 9% charge on that  
13 satellite package, isn't it?

14 A Well, I used it because that is the rate  
15 that would apply in the case of the super view  
16 package.

17 Q Its super view was not structured between  
18 basic broadcast and cable nets as the cable industry  
19 structures it?

20 A Well, the cable industry is required to  
21 have this broadcast basic structure.

22 Q And also structures it this way in order

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1 to comport with Section 111?

2 A Well, this structure was under the Cable  
3 Act of 1992 -- or was specified.

4 MR. GLIST: That's all I have.

5 CHAIRMAN GRIFFITH: All right, thank you.

6 MS. BEHAN: That's all I have.

7 CHAIRMAN GRIFFITH: All right.

8 Mr. Trautman, thank you very much, sir.

9 You are free to go.

10 THE WITNESS: Thank you.

11 CHAIRMAN GRIFFITH: Mr. Dessser.

12 MS. BEHAN: If I could just take a minute.

13 I don't need a break.

14 CHAIRMAN GRIFFITH: All right.

15 MS. BEHAN: We noticed yesterday that your  
16 binders were overflowing and you won't be able to  
17 turn, so we have given you a second one.

18 CHAIRMAN GRIFFITH: Thank you very much.

19 MS. BEHAN: You might be turning some  
20 pages today.

21 MR. DESSER: We do the standing up  
22 swearing here or --

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1 CHAIRMAN GRIFFITH: We'll do it in just a  
2 minute as soon as she's ready. You can have a seat.

3 MS. BEHAN: I understand that people in  
4 the back are having a hard time hearing not just me  
5 but a lot of people. I was just wondering if we could  
6 just -- everybody could tap their mike.

7 Are other people having a hard time  
8 hearing me?

9 CHAIRMAN GRIFFITH: Are we ready to  
10 proceed?

11 Whereupon,

12 EDWIN S. DESSER  
13 was called as a witness, and after having been duly  
14 sworn, assumed the witness stand, was examined and  
15 testified as follows?

16 DIRECT EXAMINATION

17 BY MS. BEHAN:

18 Q Good afternoon, Mr. Desser. Good morning.

19 A Good morning.

20 Q If you could turn to your testimony, and  
21 I believe it's the second tab in your book.

22 Mr. Desser, as you know, I'm Kathleen

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1 Behan, and I'm going to be asking you a number of  
2 questions today. And we're first going to begin by  
3 discussing your qualifications. And now I'm on page  
4 one of your testimony so you can follow along.

5 Mr. Desser, could you tell the Panel your  
6 full name?

7 A Edwin S. Desser.

8 Q Okay, and where are you currently  
9 employed?

10 A I work for the National Basketball  
11 Association.

12 Q Okay, what is your title there?

13 A I am President of NBA Television and New  
14 Media Ventures.

15 Q Okay, and that's affiliated with the NBA?

16 A Yes, it is.

17 Q Okay. Can you describe the business  
18 activities of NBA Television and New Media Ventures?

19 A Yes. NBA TV, as we call it, is involved  
20 in a couple of principal activities. One is business  
21 planning, new business development with respect to new  
22 media opportunities. The second is general business

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1 planning and negotiations as it relates to our  
2 national and international television policies.

3 Q Okay, could you talk a little bit about  
4 some of the new media ventures that you're involved in  
5 today?

6 A Sure. We're very much involved with the  
7 Internet, the distribution of various forms of NBA  
8 content via the Internet, the World Wide Web. We've  
9 also been involved over the past several years in  
10 investigation of and study of the DBS and HSD  
11 industries.

12 We also negotiated agreements with a  
13 number of the carriers for the carriage of NBA  
14 programming by those carriers to DBS and HSD  
15 consumers. We're also involved in looking at a wide  
16 variety of other new technologies that may be  
17 appropriate for the dissemination of NBA programming  
18 in the future.

19 For example, there's a new product that  
20 Intel has developed called Intericast, and we're  
21 involved in looking at that as a way of delivering via  
22 television signals additional data over and above the

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1 television programming and a variety of other similar  
2 undertakings.

3 In addition to the new media undertakings,  
4 we're the group within the NBA that's responsible for  
5 planning and negotiating network television contracts  
6 with NBC, with the Turner networks, and with other  
7 cable and broadcast entities with respect to the NBA,  
8 and more recently, even the WNBA, which is a new  
9 league that we've just been involved in starting.

10 Q Okay. So in the course of your work as  
11 president of the NBA Television and New Media  
12 Ventures, do you have occasion then to negotiate  
13 contracts in the free market with the networks for  
14 programming?

15 A Yes, all of the agreements that I just  
16 mentioned were arms length transactions with  
17 broadcasters, with satellite carriers, with other  
18 parties. We're not subject to any kind of government  
19 licensing.

20 Q With cable too?

21 A With cable as well, yes.

22 Q Okay. And have you actually engaged in

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1 free market negotiations with some of the satellite  
2 carriers that are represented here today?

3 A Yes, we have agreements today with  
4 Primestar and DirectTV to distribute a package of NBA  
5 programming to the home dish market. We also have a  
6 package of programming which is distributed to the  
7 HSD, the large dish, market as well.

8 Q Okay. And in the context of those  
9 negotiations, is the value of sports programming, in  
10 particular NBA basketball programming, something that  
11 comes into play in negotiating with satellite  
12 carriers, for example?

13 A I think that's at the core of those  
14 negotiations is the issue of the value of the  
15 programming to the carriers, yes.

16 Q Okay. Now how long have you been in the  
17 sports and entertainment industry?

18 A About 25 years now.

19 Q Okay, and how long have you been at the  
20 NBA?

21 A Fifteen years.

22 Q Prior to the NBA, where were you?

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1           A       I was for four years involved with the Los  
2 Angeles Lakers, LA Kings, and the Forum organization  
3 in California.

4           Q       Okay. So you actually have worked on  
5 behalf of teams as well as the NBA itself?

6           A       Yes, I've worked for teams, the NBA. In  
7 fact, prior to the time I spent with the team, I was  
8 involved in the broadcasting industry. I worked at a  
9 number of stations.

10          Q       Okay. And do you have some understanding  
11 of production technologies and the cost of creating  
12 the first run live programming that's available  
13 through NBA?

14          A       Yes, I'm involved in really looking at all  
15 facets of our business from the creation of the  
16 programming to begin with, the costs of hiring the  
17 athletes and staging the events, building the arenas,  
18 causing them to be televised, transmitted via radio  
19 and television and cable and satellite and so forth.

20                   And ultimately, at the end of that  
21 process, subject to in some respects these  
22 proceedings.

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1 Q Okay. And finally, in the course of your  
2 negotiations with cable, satellite, the networks, do  
3 you learn about the industries that you're negotiating  
4 with?

5 A One of the things that we believe very  
6 strongly is that for us to be able to negotiate  
7 effectively with any of these companies or these  
8 industries, we have to understand their businesses.  
9 We'd like to think we can understand them as well as  
10 they do. Of course, that's a little bit difficult  
11 from the outside.

12 But we understand them as well as we can  
13 based upon reading of the trade press and regular  
14 meetings with representatives of these industries and  
15 occasionally modeling of their businesses and so  
16 forth.

17 Q Okay. And now, Mr. Desser, have you also  
18 been, prior to this proceeding, familiar with the  
19 compulsory license for both cable and satellite?

20 A Yes, I'm familiar with the 111 compulsory  
21 license and the 119 compulsory license.

22 Q And are you familiar with the effect of

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1 the compulsory license on the value of your  
2 programming in both the cable and satellite context?

3 A Yes, I am.

4 Q Okay.

5 MS. BEHAN: I'd like to offer Mr. Desser  
6 up for voir dire.

7 MR. SEIVER: Your Honor, John Seiver for  
8 the Satellite Carriers.

9 I believe my questions about Mr. Desser's  
10 background and his qualifications really relate to the  
11 substance of his testimony. So I think it would be  
12 better if he just did his direct now with Ms. Behan  
13 and I'll reserve my questions on his experience and  
14 tie it in directly to the testimony rather than having  
15 to repeat it.

16 CHAIRMAN GRIFFITH: You'll cross examine?  
17 Okay.

18 MR. SEIVER: Thank you.

19 BY MS. BEHAN:

20 Q Okay, Mr. Desser, if you could turn to  
21 page two of your testimony now.

22 Mr. Desser, did you testify in the 1992

1 rate adjustment proceeding?

2 A Yes, I did.

3 Q Okay. What is the purpose of your  
4 testimony here today?

5 A The main purpose of my being here is to  
6 try and explain, based upon my perspective, the -- why  
7 I believe that there are a variety of factors that you  
8 should be taking a look at in the context of your  
9 determinations and deliberations in this matter that  
10 haven't been fully taken into effect in those previous  
11 proceedings.

12 There are a few key points that I'd like  
13 to talk about today and that I'd like you to take away  
14 with you when we're done today.

15 Q Mr. Desser, are those set out at pages two  
16 through four of your testimony?

17 A Yes, they are. They're in the summary of  
18 my testimony.

19 Q Would you mind, for the Panel, summarizing  
20 the key points that you're going to make?

21 A Sure. There are really just a few.

22 The first one is what we're dealing with

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1 here are some major corporations. These are very  
2 large communications undertakings; you know, major  
3 cable companies, major conglomerates. These are  
4 companies that commonly negotiate in the open free  
5 market for a variety of things including, in many  
6 cases, copyrighted programming.

7 They are certainly able to pay marketplace  
8 rates, and they are certainly able to afford to  
9 negotiate those rates, you know, based upon their very  
10 substantial assets and the way they conduct their  
11 business under normal circumstances.

12 This is an industry, secondly, that has  
13 grown substantially since the last adjustment  
14 hearings. Rather substantial growth, and some have  
15 described it as, you know, one of the -- at least as  
16 it relates to DBS, one of the fastest growing consumer  
17 electronics products ever.

18 There's an expectation, as we heard  
19 yesterday, that there may be some 15 million  
20 subscribers to this industry by the year 2000. It  
21 doesn't seem like the kind of industry that needs to  
22 be subsidized by copyright owners.

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1           The next point is that this is an industry  
2           that has traditionally been able to buy our  
3           programming based upon the compulsory license at  
4           government mandated prices which I believe to be well  
5           below market, and has applied a very substantial mark  
6           up to those which is a nice business to have.

7           As a percentage of revenues, we have found  
8           where we negotiate in the open market that we're able  
9           to retain a much higher proportion of the revenues  
10          that are generated off of the use of our copyrighted  
11          programming than this particular compulsory license  
12          has allowed historically.

13          Finally, there's a real difference between  
14          what happens as a result of these proceedings and what  
15          happens in the open market. When we negotiate in the  
16          open market, while price is certainly a very important  
17          element, the fact is that there are many other issues  
18          that come into those negotiations.

19          And we're able to conform the distribution  
20          of our programming -- exactly how it's distributed,  
21          where it's distributed, when it's distributed, etc. --  
22          to what we believe to be revenue maximizing

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1 opportunities. Unfortunately, under the present  
2 scenario, we're not able to obtain the benefits of  
3 certain things that are traditional in sports  
4 programming arrangements such as black outs.

5 Very common in most sports arrangements to  
6 either have black outs or define the area in which  
7 programming can be distributed. Under Section 119,  
8 there is not requirement. There aren't any FCC rules  
9 which require that we be afforded in the sports  
10 context the same sorts of opportunities that when we  
11 negotiate in the open market we're able to receive.

12 Q Okay, thank you.

13 Now what I'd like to do is just get into  
14 your testimony, Mr. Desser. And I think we'll just go  
15 straight to Table 1 on page six which is the satellite  
16 carriers. You first said that you were going to talk  
17 a little bit about the ownership relations of these  
18 satellite carriers?

19 A Yes.

20 Q So I'd like to put up a chart.

21 MR. SEIVER: Excuse me, this is John  
22 Seiver.

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1 Is that one of the tables?

2 MS. BEHAN: Yeah, it's basically the same  
3 table as on Table 1, although it does have this cute  
4 little dish on it.

5 MR. SEIVER: Well, I won't move to strike.

6 (Laughter.)

7 MS. BEHAN: Thank you.

8 CHAIRMAN GRIFFITH: Thank you.

9 MS. BEHAN: All right, is there anything  
10 on this table you'd like to correct?

11 THE WITNESS: There's one thing I noticed  
12 yesterday. The date --

13 MR. SEIVER: Just a moment.

14 I want to make sure, Your Honors, as we  
15 get into this -- and I will be quiet. I want to let  
16 Ms. Behan do her job on direct. I was getting  
17 concerned that we will get into leading questions, and  
18 I want to make sure that -- on issues like this, I  
19 don't think we're going to have a problem.

20 But I'm going to be very sensitive if in  
21 fact there are many, many questions on direct. If he  
22 wants to correct it, I presume he's entitled to and

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1 tell us about it; but I want to make sure that he's  
2 doing the testifying.

3 CHAIRMAN GRIFFITH: All right.

4 MR. SEIVER: Thank you.

5 BY MS. BEHAN:

6 Q All right, is there anything that you want  
7 to correct?

8 I'm not suggesting that there is.

9 (Laughter.)

10 A I did notice that the date of commencement  
11 for satellite operations for Primestar is listed here  
12 as 1986. And as we were discussing yesterday, it  
13 should be 1991.

14 Q That's when it went into commercial  
15 operations?

16 A That's when they began operating as  
17 Primestar.

18 Q Okay. All right, briefly, what's  
19 contained in this chart?

20 A This is a listing of the folks that are  
21 taking advantage of the Section 119 compulsory  
22 license. The left-hand column is a list of the

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1 roughly ten carriers, if we're going to count ASkyB,  
2 though they haven't begun operation yet, that are  
3 involved.

4 The middle column indicates the ownership  
5 of those various entities. For example, if we take a  
6 look at the first line, United Video/Superstar, it is  
7 majority owned by TCI, the largest cable company in  
8 the country with some \$6 billion dollars in revenue.

9 The final line in the chart on the right-  
10 hand side just indicates when they began operating as  
11 a satellite carrier.

12 Q Okay. Mr. Desser, these -- you've  
13 described these companies on pages seven through 14,  
14 is that correct?

15 A Yes, there's detailed information on each  
16 one of the companies taking a look at the signals that  
17 they carry, the revenues where we were able to  
18 ascertain them from public documents, as well as  
19 number of subscribers in most cases.

20 Q Okay. And Mr. Desser, what I'd like to do  
21 in a minute is briefly go through the chart. But for  
22 the Panel's benefit and so that we can go through this

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1 line by line, have you also included with your  
2 testimony exhibits which include promotional and  
3 financial information for some of these satellite  
4 carriers?

5 A Yes. In the voluminous documents here, we  
6 have copies of 10K's. We've got a variety of  
7 information that was pulled off of the Web sites for  
8 these various carriers. There are ads from trade  
9 publications. I'm not going to be talking about most  
10 of those things today, but they're here for your use  
11 as you try to find a lot of information in one nice,  
12 neat place.

13 So I'd encourage you to take a look.

14 Q Perhaps at the end of your testimony we'll  
15 briefly go through those.

16 But right now, if you could just start --  
17 why don't you start with United Video and just  
18 describe briefly the satellite carriers and  
19 particularly focusing on the ownership issues -- who  
20 owns them; you know, what are the revenues to the  
21 extent that we have that information; and other types  
22 of issues relating to ownership and operations that

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1 you find pertinent to the Panel.

2 A Sure. United Video is one of the largest  
3 of the satellite carriers. They distribute three  
4 principal broadcast stations under the compulsory  
5 license: WGN out of Chicago, WPIX out of New York,  
6 and KTLA out of Los Angeles.

7 As I mentioned a moment ago, they're owned  
8 -- they're majority owned and controlled by TCI which  
9 is the largest cable company in the country with  
10 roughly 14 million subscribers. There are about 40  
11 million households that are receiving the signals that  
12 I mentioned a moment ago through United Video and/or  
13 Superstar.

14 Q What about Southern Satellite on page  
15 nine, for the Panel's information?

16 A Southern Satellite is the common carrier  
17 that distributes WTBS. I believe it was the first  
18 carrier in operation back when Ted Turner got the idea  
19 of putting a station up on satellite and distributing  
20 it to cable systems.

21 Q Could you explain a little bit more about  
22 what you mean by common carrier?

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1           A       Sure. There are a variety of companies  
2       which have undertaken under the provisions of FCC  
3       rules to distribute signals to cable systems. They  
4       operate -- cable systems and home satellite dish  
5       owners. They operate as carriers. They are -- you  
6       know, they are common carriers meaning, you know, not  
7       unlike the telephone company.

8                   They have the opportunity to pull  
9       broadcast stations out of the air and deliver them for  
10      a fee to cable systems and to satellite home dish  
11      owners. And they negotiate for the rates for that  
12      carriage of the signal with those cable systems.  
13      They're also able to market directly to the satellite  
14      dish owners.

15           Q       And Southern Satellite provides TBS then  
16      to DBS operators?

17           A       Yes. Southern Satellite only distributes  
18      that one signal. However, they are also owned by TCI,  
19      and they've been doing it since 1976.

20           Q       Okay. Who now owns TBS?

21           A       TBS, the broadcast station, is owned by  
22      Time Warner. And Time Warner has an option under an

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1 agreement with TCI under certain circumstances to buy  
2 Southern Satellite. So Time Warner's the second  
3 largest cable operator. TCI is the largest cable  
4 operator.

5 One of the two of them is going to be  
6 owning it now or in the near future.

7 Q Okay. Advance/Newhouse?

8 A Advance/Newhouse is formerly known as  
9 Eastern Microwave. They distribute two signals. Or  
10 at least at the time of this report when my testimony  
11 was prepared, they distributed two signals: WSBK out  
12 of Boston, and WWOR out of Secaucus, New Jersey.

13 Since that time, another company has  
14 picked up the distribution of WWOR. But this was  
15 correct at the time this was done.

16 Newhouse is another entertainment  
17 publishing related company. They have owned cable  
18 systems, publishing interests, newspapers, that sort  
19 of thing.

20 They have, over the past few years,  
21 reached an operating arrangement with Time Warner so  
22 that Time Warner actually manages their cable systems

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1       nowadays.

2               Q       Okay. NetLink?

3               A       NetLink is also owned by TCI. NetLink  
4 distributes a package of distant signals that they  
5 call the Denver Five because all of them are Denver  
6 area stations. These are affiliates of each of the  
7 three major broadcast networks plus PBS; and one  
8 garden variety super station, KWGN out of Denver.

9                       They've also added the Fox affiliate in  
10 Denver. So while there's -- while it's Denver Five,  
11 there is a sixth signal that they also distribute.  
12 That's the -- the NetLink operation has about \$160  
13 million dollars of revenues per year.

14              Q       \$160 or \$130?

15              A       \$160.

16              Q       Is that a correction?

17              A       Yes. I should mention that in the course  
18 of compiling what is a lot of information, a few typos  
19 crept into the report. And we went back and rechecked  
20 them with my staff over the past few weeks, and we did  
21 find a few typos. So I'll try to correct those as I  
22 go along.

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1                   And I'm sure if I miss some, you'll remind  
2 me.

3           Q       Blame me, not you, right?

4           A       Well, I take responsibility.

5           Q       All right. PrimeTime 24?

6           A       PrimeTime 24 is another one of these  
7 groups that uses the 119 license. They distribute two  
8 different packages of channels: one that's called  
9 PrimeTime East, one that's called PrimeTime West. And  
10 I think there was some discussion of them yesterday.

11                   Essentially what those are are packages of  
12 the three major broadcast networks, ABC, NBC, CBS. In  
13 the case of PrimeTime East, those are eastern time  
14 zone stations. PrimeTime West are west -- pacific  
15 time zone stations.

16                   PrimeTime 24 -- I guess this is one of the  
17 exceptions. They're not owned by TCI, but they're  
18 owned by a cellular telephone -- an international  
19 cellular telephone company that I believe is based in  
20 Sweden of about \$130 million dollars of annual  
21 revenues.

22           Q       Okay. PrimeStar Partners?

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1           A       PrimeStar is one of the DBS distributors,  
2           though there's some debate as to whether they're  
3           properly categorized as true DBS because they operate  
4           on a mid power satellite as opposed to a high powered  
5           satellite.     But be that as it may, PrimeStar  
6           distributes six network affiliates.

7                     I should say five network affiliates plus  
8           WTBS out of Atlanta.   They've got roughly a million  
9           eight subscribers.   PrimeStar is owned by most of the  
10          major cable companies in this country:   TCI, Time  
11          Warner, Continental, Cox, Comcast, and Newhouse.   In  
12          addition, one of the subsidiaries of General Electric  
13          is also an owner of PrimeStar.

14          Q       Okay.

15          A       They've got about \$200 million dollars in  
16          revenues a year.

17          Q       If you add together the cable subscribers  
18          for those six companies that have an ownership  
19          interest in PrimeStar, what percentage of U.S. cable  
20          subscribers are covered by those companies?

21          A       Their cable operations for those six  
22          companies represent roughly 60% of the U.S. cable

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1 industry.

2 Q Okay. And I'm sorry, did you indicate  
3 what their 1995 revenues were?

4 A Yes, \$200 million.

5 Q Okay. All right, DirecTV?

6 A DirecTV is another one of these very major  
7 corporations. DirecTV is owned by Hughes  
8 Communications and AT&T. Hughes Communications is  
9 owned by General Motors, and they've got -- you know,  
10 Hughes has got some \$14 billion dollars in revenue.  
11 AT&T's I think even bigger, but I don't remember that  
12 figure offhand.

13 AT&T bought a minority interest in DirecTV  
14 I'd say about a year and a half ago that they paid  
15 \$137 million -- \$137½ million dollars for 2½% of  
16 DirecTV, giving DirecTV a rather substantial valuation  
17 in the marketplace.

18 Q All right, and Hughes Electronics, what  
19 are its annual revenues?

20 A Hughes Electronics has annual revenues of  
21 about \$14 billion dollars.

22 Q EchoStar?

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1           A       EchoStar was one of the companies that was  
2       discussed yesterday because of their announced merger  
3       with News Corporation and MCI. We'll talk in a moment  
4       about ASkyB. But EchoStar is a long time manufacturer  
5       of satellite equipment, has been in operation for  
6       about 17 years, and has started up its own direct  
7       broadcast satellite business, the dish network.

8                   It's another one of these 18 inch  
9       satellite operations. It's distributing four -- at  
10      the time of this document, it was distributing four  
11      distant signals. Since the time of this document,  
12      they have added WSBK in Boston; so they're now  
13      distributing a total of five distant signals subject  
14      to 119 royalties.

15           Q       Okay. And then Tee-Comm, or AlphaStar  
16      it's sometimes called?

17           A       Tee-Comm is the corporate owner of  
18      AlphaStar. AlphaStar is the smallest of the current  
19      operating DBS services. They commenced operation just  
20      last year. They distribute WTBS as part of their  
21      offerings. They've got annual revenues -- I should  
22      say Tee-Comm does of about \$50 million dollars a year.

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1 Q And finally, ASkyB?

2 A ASkyB has been much in the news recently.  
3 They are owned by MCI and News Corp. which is the  
4 Rupert Murdoch controlled entity. You may have seen  
5 that they purchased the frequencies in an auction  
6 recently to operate ASkyB for \$682½ million dollars.

7 That, of course, is just for the  
8 frequencies. They then have to build a satellite and  
9 launch the business, so there's a big bet being placed  
10 by those folks. They have recently entered into an  
11 arrangement, though it has not closed, with EchoStar;  
12 so they're going to -- they propose to combine their  
13 operations.

14 There's some billion dollars or  
15 thereabouts changing hands in the transaction, and  
16 they are planning to commence, you know, DBS service  
17 that combines what is the current dish network from  
18 EchoStar with what ASkyB has in terms of frequencies  
19 and satellites and so forth.

20 Q Okay. Now, Mr. Desser, you've provided  
21 revenue information for many of these satellite  
22 carriers and their parent companies. Do you know

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1 anything about cost for these satellite carriers?

2 A We've been through all of the public  
3 documents that we could find. As I mentioned before,  
4 the 10K's, annual reports. Many of these are major  
5 corporations that have filing requirements. However,  
6 a lot of the detail that would be necessary to have a  
7 handle on their cost is not available in those public  
8 documents.

9 It's information we would have liked to  
10 have had for purposes of preparing testimony, but my  
11 understanding is it has not been produced for these  
12 hearings.

13 Q Do you know if the Joint Sports Claimants  
14 requested that information?

15 A Oh, certainly; we asked for it, but it has  
16 not been supplied.

17 MR. SEIVER: Your Honor, that's not part  
18 of his direct testimony.

19 I object.

20 CHAIRMAN GRIFFITH: Do you have any  
21 response for me, Ms. Behan?

22 CHAIRMAN GRIFFITH: He didn't say anything

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1 about the discovery request because the cases were  
2 submitted at the time of that discovery, but I think  
3 it's pertinent to the Panel; and I think it's  
4 pertinent to the Panel to understand that the  
5 information wasn't provided.

6 MR. SEIVER: It has nothing to do with his  
7 direct.

8 CHAIRMAN GRIFFITH: All right. That  
9 question of his testimony is stricken.

10 MS. BEHAN: Okay.

11 BY MS. BEHAN:

12 Q Just for the Panel's information, you just  
13 referred to some 10K's. And can you go to Tab 11 of  
14 the exhibits now?

15 A Sure. As I mentioned before, we have  
16 tried to pull together a lot of the pertinent  
17 information. We have at Tab 11, JSC Exhibit 11, the  
18 10K for TCI.

19 Q Okay. And do you have at Exhibit 10  
20 another 10K?

21 A Yes, Exhibit 10 is the 10K for United  
22 Video.

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1 Q Okay. For United Video, could you go back  
2 to page -- just real briefly, page eight of your  
3 testimony at Table 2. Could you just describe what  
4 you've put in that table for the Panel?

5 A Certainly. As I mentioned, all of the  
6 information in this table did come out of the 10K,  
7 which is Exhibit 10.

8 This lists for the various categories of  
9 United Video's business, namely their United Video TV  
10 which distributes programming to cable; Superstar,  
11 which is the division which distributes programming to  
12 the satellite dish market; and other, which is  
13 everything else that United Video is involved with.

14 The bottom line is United Video in 1995  
15 reported almost \$263 million dollars of revenue and an  
16 operating income level of \$38.4 million dollars.

17 Q All right. So Mr. Desser, having reviewed  
18 the ownership interest revenues and the operations of  
19 the various satellite carriers, what do you conclude  
20 about the financial health of the satellite carriers  
21 today?

22 A From what I can see, these are profitable

1 businesses. We don't have as much detail on the  
2 others, but certainly United Video is a profitable  
3 undertaking today. They have, over the past several  
4 years, very dramatically increased their level of  
5 profit.

6 Going back just to 1991, United Video  
7 reported \$7.6 million dollars of operating income.  
8 And in 1995, it was up to \$38.4 million dollars of  
9 operating income.

10 MR. SEIVER: Did you say million?

11 THE WITNESS: Million, yes.

12 BY MS. BEHAN:

13 Q Okay, and then since the 1992 rate  
14 adjustment proceeding, do you believe that -- what do  
15 you believe has happened to the satellite carrier  
16 business?

17 A What has happened is that there has been  
18 an addition of C-band subscribers; and more recently,  
19 a huge increase in the Ku-band or DBS subscribers that  
20 many of these carriers deliver.

21 Q Okay. And in your view, based upon the  
22 financial performance and indicia that you've just

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1 described of the satellite carriers, what would you  
2 conclude about whether the 1992 royalty rates, the  
3 ones determined in that proceeding which you  
4 testified, whether they're the rates that would  
5 prevail in the free market?

6 MR. SEIVER: I'm sorry, I couldn't hear  
7 the end of the question. Could you repeat the  
8 question?

9 MS. BEHAN: Yes.

10 BY MS. BEHAN:

11 Q What do you conclude, based on what we  
12 just reviewed about satellite carriers' financial  
13 health -- if you were just looking at that portion of  
14 it right now, what would you conclude about the --  
15 whether the rates that were adopted in the 1992  
16 proceeding at which you testified are the rates that  
17 would prevail in the free market?

18 A Well, I don't believe that the rates from  
19 that hearing are free market rates at all. Free  
20 market rates are those which a willing buyer and a  
21 willing seller arrive at. I can certainly say on  
22 behalf of the NBA that under the particular terms of

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1 this arrangement, we're certainly not a willing  
2 seller.

3 But we don't have a lot of choice.

4 Q If you can go now to Table 3, we're going  
5 to move into a new topic. And if you can just briefly  
6 describe for me what you've listed in Table 3 on page  
7 16.

8 A Sure. Table 3 summarizes a great deal of  
9 the information that I just mentioned in terms of the  
10 carriers and the signals that they carry as you look  
11 at the left-hand two columns. The right-hand two  
12 columns indicate two other things; one, the type of  
13 signal.

14 As has been discussed a little bit before,  
15 there are basically three types of signals in the 119  
16 rates at present, those being super stations, syndex  
17 proof super stations, and network stations. Those are  
18 indicated in the typed column by the initials SPS and  
19 N.

20 Finally, in the right-hand column is  
21 listed in the number of subscribers that were reported  
22 based upon the most recent information that was

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1 available when this testimony was created which was  
2 from June of 1996. There are, as I think was pointed  
3 out yesterday, more recent documents available in the  
4 Copyright Office.

5 Q Okay. Mr. Desser, I'm going to have you  
6 just briefly describe for me a little bit about some  
7 of these signals, but first I'd like to say we do have  
8 a list of the errata for some of these numbers that  
9 have changed very slightly.

10 I understand that we haven't made a  
11 decision on that. It might be easier for the Panel if  
12 I could hand it out. But I guess --

13 MR. SEIVER: If I might address that. I'm  
14 sorry, this is for the 1996-1 statements that you want  
15 to put in?

16 MS. BEHAN: No, all I'm addressing is the  
17 errata that relate to changes in some of the tables  
18 that I've been going through information so the Panel  
19 has it before them.

20 MR. SEIVER: From what I saw, Your Honor,  
21 I don't think that there's any substance to the  
22 correction that is a problem. I think I saw some

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1 digits transposed. There are some other curious  
2 changes, but I don't think I want to take up the time  
3 with the Panel's questions as to why he saw it one way  
4 one day and maybe a different way another.

5 So I'm willing to let those changes come  
6 in. If you want to just do a documentary, that's fine  
7 too.

8 MS. BEHAN: All right, and this is the  
9 exact same attachment to the motion that was filed at  
10 the Copyright Office.

11 CHAIRMAN GRIFFITH: This will be the Joint  
12 Sports Claimants Exhibit 1-X-1.

13 MS. WOODS: No, Your Honor. It wouldn't  
14 be 1-X because that's just a cross examination.

15 CHAIRMAN GRIFFITH: Right.

16 MS. WOODS: I'm not sure what their last  
17 exhibit number was.

18 CHAIRMAN GRIFFITH: I have them in the  
19 other --

20 MS. BEHAN: I guess we could call it --

21 CHAIRMAN GRIFFITH: This is number two.

22 MS. WOODS: Well, --

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1 MS. BEHAN: For the purposes of the  
2 hearing -- I mean, we've got exhibits numbered in our  
3 direct case. We could do 1-D for our direct case. I  
4 think this is the first one that we've actually --

5 MR. SEIVER: Ms. Behan, could I make a --

6 MS. BEHAN: Sure.

7 MR. SEIVER: -- suggestion? I think we  
8 should distinguish between hearing exhibits and direct  
9 case exhibits. So I would prefer, so I know what's  
10 going on, if we do hearing exhibit 1-D, if that's the  
11 way you want to do it with direct and cross.

12 MS. BEHAN: Is that okay with you guys?

13 MR. SEIVER: I think that will keep it  
14 more orderly.

15 MS. WOODS: This would have been two.

16 CHAIRMAN GRIFFITH: I could get it.

17 JUDGE GULIN: The one yesterday was a  
18 supplement to the direct, the written testimony;  
19 whereas this is hearing testimony.

20 MS. BEHAN: Oh, yeah; we called that a  
21 supplement. Yeah, because it was just something we  
22 could refer to, so we called it 1-B.

1 CHAIRMAN GRIFFITH: 1-B.

2 MS. BEHAN: I'll do it however you'd like  
3 to do it.

4 CHAIRMAN GRIFFITH: What do you suggest?

5 All right, we'll identify this as JSC  
6 Hearing Exhibit Number 1, all right?

7 (Whereupon, the above-  
8 referenced document was marked  
9 as JSC Hearing Exhibit 1 for  
10 identification.)

11 BY MS. BEHAN:

12 Q Now Mr. Desser, I'm not going to mark this  
13 as an exhibit or introduce it in your testimony, but  
14 it is just a guide to where, as you're going through  
15 the signal here, where they are.

16 If you can just briefly for me describe  
17 some of the signals that are carried on these various  
18 -- that are transmitted by these satellite carriers?

19 A Certainly. Just starting at the top of  
20 the page with the United Video/Superstar signals, they  
21 are all super stations as opposed to network stations.  
22 Two of them are traditional super stations, KTLA in

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1 LA, WPIX in New York; and then there's WGN out of  
2 Chicago which is a syndex proof super station.

3 I should just very briefly mention what  
4 the syndex proof notion is about. Syndex proof is  
5 something which was developed by I believe the  
6 carriers in response to requirements that cable  
7 operators black out certain syndicated programming.  
8 The "synd" of syndex stands for syndicated.

9 The "ex" stands for exclusivity. And so  
10 to make it very brief, the syndex proof super stations  
11 are distributed to cable and don't require that the  
12 cable systems black out certain of the programs to  
13 protect the exclusivity in those particular markets.

14 That issue of exclusivity, as I mentioned  
15 at the outset, is a pretty significant issue. And  
16 certainly for sports in the context of black outs and  
17 the like, the notion of exclusivity is very important.

18 Q Mr. Desser, just to make it clear for the  
19 Panel though, do satellite carriers actually have to  
20 pay attention to syndex? Do they have to black out  
21 programming?

22 A No, the satellite carriers are not

1 required to black out the syndicated programs as the  
2 cable systems are.

3 Q Okay. And what does N stand for?

4 A N -- if you jump down to NetLink, you'll  
5 see the first group of signals that are designated N.  
6 Those are all network affiliates. They're  
7 distributing the programs of the four major broadcast  
8 networks.

9 Just to complete the chart, the numbers in  
10 the right-hand column are the number of subscribers  
11 that the carriers themselves have reported, in this  
12 case as of June 1996, to the Copyright Office. These  
13 are in forms that are submitted to the Copyright  
14 Office twice per year.

15 And some of the nomenclature that is used  
16 in this area -- they're so-called 1996-1's and 1996-  
17 2's. The ones refer to the first half of the year,  
18 the two to the second half of the year, just in case  
19 that comes up at some point in the future.

20 Q Mr. Desser, actually, why don't we go now  
21 since you've raised that to JSC Exhibit 12.

22 A Okay, that's in the notebook?

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1 Q In the notebook, yes.

2 And if you could just briefly explain to  
3 the Panel what JSC Exhibit 12 is?

4 A Sure. This is --

5 MS. BEHAN: In the back.

6 CHAIRMAN GRIFFITH: In the back? Okay.

7 THE WITNESS: Tab number 12, this is a  
8 copy of the form that was submitted by PrimeStar to  
9 the Copyright Office for the signals that it was  
10 carrying subject to the 119 compulsory license.

11 As you can see, if you look in space A,  
12 they have checked off the first box indicating that  
13 this was for the first half of 1996 as oppose to the  
14 box on the right which would be for the second half.

15 BY MS. BEHAN:

16 Q Mr. Desser, on page three of that  
17 statement of account, could you just go to the entry  
18 TBS and explain for the Panel how you put together  
19 this chart -- how you got the numbers that you put in  
20 this chart now that's on Table 3?

21 A Sure. If you look in the middle of the  
22 page on page number three, you'll see the indication

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1 -- the heading says Syndex Proof Super Stations. And  
2 then written in by hand is -- by PrimeStar, WTBS is  
3 the call signs. Then you see a notation for the  
4 number of subscribers at the end of each month.

5 And as you can see, it is -- I think just  
6 about every month it is growing over the previous  
7 month. But if you take a look at month number six,  
8 which is for June of 1996, you see \$1,228,000 and  
9 change.

10 If we go over to PrimeStar on table number  
11 three and follow the WTBS line which is the first line  
12 all the way over to the right-hand side, we see  
13 \$1,228,573, which is the same number as in the form  
14 that was filed with the Copyright Office.

15 And the other numbers on this page were  
16 taken in a similar manner from these statements of  
17 accounts.

18 Q Okay. Now if you could go to page 17 on  
19 Table 4.

20 CHAIRMAN GRIFFITH: Ms. Behan, let me  
21 interrupt you; and Mr. Dessser, explain to you, sir --  
22 we take our morning recess. We'll take about a ten

1 minute recess at this time.

2 (Whereupon, the foregoing matter went off  
3 the record at 11:29 a.m. and went back on  
4 the record at 11:45 a.m.)

5 DIRECT EXAMINATION (con't.)

6 BY MS. BEHAN:

7 Q All right, Mr. Desser, when we last left  
8 off we were about to go to Table 4.

9 A All right.

10 Q Mr. Desser, can you tell me what's  
11 described in Table 4 on page 17?

12 A Sure. Table 4 is another form of summary  
13 of the information that we've looked at so far with a  
14 little bit added. Here we take a look at each of the  
15 various signal groups. And in the case of the network  
16 signals, they have been added together so that we see  
17 the total number of subscribers for each one of these  
18 signal types.

19 But I do want to make clear that in the  
20 case of the network signals, it may be multiple  
21 stations that are represented. We take -- we look  
22 here at the number of subscribers that each one of

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1 those signal groups had based upon the end of 1991,  
2 which was in essence prior to the last rate  
3 proceeding, and compare that to the number of  
4 subscribers as of mid 1996, the most recent  
5 information available.

6 And then just calculate the percentage  
7 change over that period of time. I should note that  
8 here is where I made a few adding mistakes and  
9 transposition mistakes and it's in the errata. But in  
10 essence, it doesn't change a great deal. The  
11 percentage increases end up being substantial, in any  
12 event.

13 Q In some instances, are the percentage  
14 increases more?

15 A Yes, there are cases where the percentage  
16 increases are more or are much more. You know, for  
17 example, on the Fox -- in the Fox example, last line,  
18 the percentage increase is, you know, in the thousands  
19 of percent increase because the base is so low.

20 Q Okay. Now what's the source of this  
21 table?

22 A This again is information that is compiled

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1 from the statements of account filed with the  
2 Copyright Office. The comparison is between the  
3 statement of account for 1991 versus 1996. And as I  
4 mentioned, any time there is a signal that's carried  
5 by more than one of the distributors, it's been lumped  
6 together just so that we can look at it on a signal by  
7 signal or network by network basis.

8 Q Why did you choose 1991-2 for comparison  
9 purposes?

10 A That was -- those were the last numbers  
11 available prior to the last rate adjustment hearing.

12 Q Okay. And at the bottom of your chart, I  
13 notice a star. Can you tell me what's -- what you  
14 explain in that paragraph there?

15 A Yes. It's possible that because of the  
16 way that this is calculated there may be some modest  
17 amount of double counting. For example, somebody  
18 could buy a package which is PrimeTime East and  
19 PrimeTime West.

20 And if they did that, then each one of the  
21 network signals would be counted twice, as an example.

22 Q Okay. Now if you'd go to Figure 1 on page

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1 18, what is Figure 1?

2 A Figure 1 is a representation of this same  
3 information which basically just shows the kind of  
4 growth in the distribution of these signals since the  
5 time of the last rate adjustment proceeding. The blue  
6 is the subscriber level in 1991. The purple is the  
7 subscriber level in 1996.

8 And you can see the growth has been  
9 dramatic.

10 Q Is there -- is the information on these  
11 two tables the same?

12 A The information is the same. Because the  
13 purple and blue in the chart in the report kind of is  
14 hard to differentiate, but in the eye -- I had this  
15 chart done separating the blue and the purple. It's  
16 the same information, but I thought it was easier to  
17 see this way.

18 Q Okay. Now Mr. Desser, if I could take you  
19 to page 19. Do you know what the -- we're going to  
20 talk a little bit about royalty rates, okay?

21 A Okay.

22 Q And we'll relate those to other values.

1 But for now, we'll just talk about royalty rates in  
2 the compulsory license.

3 Do you know when the Satellite Home Viewer  
4 Act was passed?

5 A It was originally passed in 1988. At that  
6 time, the act had fixed rates which were three cents  
7 for network stations and 12 cents for super stations.

8 Q Okay. And how were those original rates  
9 determined and who determined them?

10 A They were determined as part of the  
11 legislative process. They were embodied in the act at  
12 that time.

13 Q Okay. Did the rates change at some point?

14 A Yes; there was, as I mentioned, an  
15 adjustment proceeding in 1992. The result of that  
16 proceeding was that the network rates went from three  
17 cents to six cents. The --

18 Q Mr. Dessler, it's on page 20 if you want to  
19 go to Table 5.

20 A Okay, sure. It's set forth here. The new  
21 rates that were applicable as of that point -- as I  
22 said, the network stations went from three cents to

1 six cents; the super stations went from 12 cents to  
2 17½ cents; and a new category was created in that  
3 proceeding which were these syndex proof super  
4 stations, and that was a rate of 14 cents.

5 And that's per subscriber per month.

6 Q Now Mr. Desser, as a result of the change  
7 in royalty rates and the increase in subscribers since  
8 1991-2 right before the last proceeding, what has  
9 happened to the biannual royalty payments?

10 A The payments for the half of the year in  
11 1991 were a million nine. The payments for the first  
12 half of 1996 were \$13.5 million dollars.

13 Q Mr. Desser, on page 21, Table 6, what have  
14 you done there? I see the number, but what is Table  
15 6?

16 A Table 6 takes that \$13½ million dollars  
17 and shows the amount that each of the various carriers  
18 contributed to that total both in terms of dollars and  
19 as a percentage of the \$13.5 million. You can see,  
20 for example, that United Video/Superstar represented  
21 about a quarter of all of those royalties.

22 Q Okay. Of the satellite carriers listed,

1 can you tell me again which of those satellite  
2 carriers does TCI have a financial interest in?

3 A Sure. They have an interest in United  
4 Video. They have an interest in PrimeStar. They own  
5 Southern Satellites. They own NetLink. And that  
6 would be all at this time.

7 Q Okay. And how many of the top five then  
8 do they have an interest in?

9 A That would be one, two, three, four of the  
10 top five.

11 Q Okay. If you could just look on page 22  
12 of the -- what is Figure 2?

13 A It's the same information shown in a pie  
14 chart form. The amounts have been rounded, so you can  
15 see United Video at 25% as the largest, and all the  
16 other ones around the pie.

17 Q Okay, and then if you take those four  
18 carriers in which TCI has an interest, generally how  
19 much of the royalty pool does TCI related companies  
20 account for?

21 A It's about 64%.

22 Q Okay. And is that a change from your

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1 written testimony?

2 A Yes, that was one of the addition mistakes  
3 that we made.

4 Q Okay. Now if you could briefly go back  
5 for me to page eight, the TCI, you just said, accounts  
6 for 64% of the revenues. TCI -- of the royalties.  
7 TCI, what are its annual revenues?

8 A TCI has overall annual revenues of about  
9 \$7 billion dollars.

10 Q Okay. Now when we were discussing earlier  
11 United Video/Superstar, can you explain for the Panel  
12 what kind of programming Superstar provides --

13 A Sure.

14 Q -- and what service?

15 A Superstar provides a package of  
16 programming to satellite dish owners. They market it  
17 under the brand name of Superstar, and then there are  
18 various packages that they offer.

19 They range from à la carte packages -- or  
20 I should say à la carte offerings of individual  
21 signals if somebody was interested in just buying one  
22 or just buying a handful of signals; to very expansive

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1 packages that include an array of basic cable  
2 networks, of super stations, and in some cases,  
3 network signals as well.

4 Q Okay. And is Superstar one of the TCI  
5 related satellite carriers?

6 A Yes, they are.

7 Q Okay. Look under Table 7. Now we've just  
8 been discussing royalty payments and the royalty pool.  
9 Can you tell me, what have you done here on Table 7?

10 A Okay, this is a look at some of the  
11 packages that Superstar offers. And they offer a wide  
12 variety, so this is not intended to be exhaustive; but  
13 it's a few examples. We have information in the  
14 exhibits that includes, you know, their rate card off  
15 of the Web site, that sort of thing; and we can refer  
16 to that to find these particular sites, if you wish,  
17 in a moment.

18 Let me just kind of walk through an  
19 example of what the chart is. If we take -- we'll  
20 start with a simple example which would be WTBS on the  
21 bottom of this chart.

22 WTBS, since it's a syndex proof super

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1 station, the rate at current under 119 is 14 cents per  
2 subscriber per month, and that's indicated here in the  
3 second column. If you then move over to the third  
4 column, the retail price column, you see a range of  
5 \$1.58 to \$2.25.

6 This is from their à la carte rate card  
7 which I don't want to suggest is the way that, you  
8 know, everyone buys these signals, but it's just an  
9 example.

10 Q Mr. Desser, to be helpful to the Panel  
11 right now, maybe we should go actually to their à la  
12 carte rate card on --

13 A Sure.

14 Q -- page eight of JSC Exhibit 9.

15 A Yes, if you go to nine in the tab, there  
16 are these nice color pages.

17 And if you look in the bottom right-hand  
18 corner, the exhibit is numbered and you can look at  
19 page 08. You can see the à la carte rate card. And  
20 if you turn to the second page of that rate card which  
21 is page nine of Exhibit 9, go almost to the bottom,  
22 you can see WTBS.

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1           And you'll see in the first column under  
2 price \$2.25. That, in effect, is the top of the rate  
3 card if you were to buy WTBS as a stand alone signal  
4 and not buy anything else; which I'm not suggesting  
5 very many people do, but just to look at it in  
6 isolation for a moment.

7           You see that \$2.25 at the top end of the  
8 range here under retail price. If you go across on  
9 that line on Exhibit 9 to the \$20, that's a discounted  
10 price that is offered if you buy it for a year as  
11 opposed to buying it on a monthly basis. So there are  
12 all kinds of discounts for buying multiple signals,  
13 buying for longer periods of time, etc.

14           So if we take the \$20 and do the division,  
15 we get the low end of the range that's set forth under  
16 the retail price.

17           Q       We use the term à la carte, but are some  
18 of these actually sold in combinations?

19           A       Yes. On this page, you can see various  
20 different packages that are offered which are some of  
21 the packages that Superstar offers. But just -- I  
22 wanted to kind of walk through that particular example

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1 looking at that one channel.

2 If we want to take another example of a  
3 package, let's go to the top of that chart which is  
4 Denver Five. As I mentioned a little bit earlier,  
5 Denver Five is this package of signals all emanating  
6 out of Denver. They're all broadcast signals.

7 And if we added up the Section 119 royalty  
8 for each one of those signals, we'd come up with 14½  
9 cents per subscriber per month for that group of  
10 signals. If we take a look back at this à la carte  
11 rate card -- let's see if it's in the à la carte or if  
12 it's in the other one.

13 Q You could go to page five.

14 A Yeah, that's the other one.

15 Q It's listed on page five.

16 A It's a complicated rate card, I think.

17 We take a look at the third line on JSC 9,  
18 page five. You can see the Denver Five listed. There  
19 are many, many packages. And I don't want to suggest  
20 that this is the only way that you can buy this.

21 But just for illustrative purposes, if you  
22 were to buy those five Denver signals, the copyright

1 rate would be 41 cents. The selling price works out  
2 to be anywhere from \$4.00 to -- \$4.08 to \$5.50.

3 I don't think this is the page that's got  
4 that on it. And I apologize in advance for this being  
5 a little tough going back and forth. That's the  
6 reason that when we were putting it all together there  
7 were a few little errors. But --

8 Q Well, it's actually on page eight. Do you  
9 see the Denver Five under the à la carte for the first  
10 page rather than the second page?

11 A That's why I circled it.

12 Q Midway down.

13 A Yes, it's about two-thirds of the way down  
14 the page. You can see the -- under monthly, the \$5.50  
15 price; and then under annual, \$60 price; and from the  
16 \$60 price, we get the \$5.50 -- I'm sorry, the \$4.08  
17 which is the low end of the rate card.

18 Q All right. And then finally, how did you  
19 get the per signal retail price?

20 A That's just a matter of division. The  
21 previous two columns are dealing with the whole  
22 package. And if you wanted to look at it on the basis

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1 of the per signal rate, for example, the \$5.50 number  
2 divided by the five signals is \$1.10.

3 Q All right. And if you look at Figure 3,  
4 is this essentially what you've represented in Figure  
5 3 is the information that's on Table 7?

6 A Yes. What you see here, and we were just  
7 talking about the Denver Five -- here is, in the  
8 purple, the royalty that is paid under 119. Here in  
9 the solid blue is the retail price for that package.  
10 And then this amount here shows the differences  
11 between the minimum retail price based upon buying  
12 that full year to the maximum if you were to buy it  
13 just for one month.

14 So that would be the most expensive it  
15 would be. That would be the least expensive it would  
16 be in this particular package against a royalty of 41  
17 cents.

18 Q Okay. All right, what is the  
19 significance, in your view, of these disparities?

20 A Well, I think it indicates a couple of  
21 things. One is that when you're paying a relatively  
22 small royalty, you've got a great deal of flexibility

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1 in the amount that you can charge.

2 And you can package, you can do a variety  
3 of things; but all -- if all you have to pay is the 41  
4 cents, there's an opportunity to capture a pretty good  
5 margin on that cost basis.

6 Q Okay. If you can go to page 26.

7 Now have you done something similar in  
8 terms of royalty versus retail price for PrimeTime 24?

9 A Yes, another form of package like the  
10 Denver Five are the PrimeTime 24 East and West, as  
11 we've been talking about.

12 The 119 royalty for PrimeTime East -- if  
13 you look in the middle column on Table 8, there are  
14 three signals, the three broadcast -- major broadcast  
15 networks in PrimeTime East, three times six cents is  
16 18 cents.

17 And here we see a retail price on an à la  
18 carte basis of \$4.16. Again, this comes from Exhibit  
19 Number 6.

20 Q Okay, so number six would be the promotion  
21 material that we referred to earlier, but this time  
22 for PrimeTime 24?

1 A That's correct.

2 Q Okay. All right, Mr. Desser, I'd like to  
3 actually go into a new topic now which relates to the  
4 sports programming in particular.

5 Is it true -- or have we been talking  
6 about more than just sports programming generally up  
7 to now?

8 A Yes, we've been talking about a wide array  
9 of programming: sports, news, general entertainment,  
10 movies, etc.

11 Q Okay. Now let me ask you, do the  
12 satellite carriers broadcast sports programming  
13 through the compulsory license?

14 A Yes, they do.

15 Q Okay. A lot or a little?

16 A I would say a lot.

17 Q Okay. If you -- what I'd like to do is go  
18 through some of the signals and the extent to which  
19 sports programming is on those signals, okay?

20 A All right.

21 Q And for the Panel's benefit now, we're  
22 going to be referring to Tables 9 and 10 which are on

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1 pages 29 and 30. And I'm just going to put them up.  
2 And if you'll notice, the difference of what you have  
3 in words, we've now put in cute little symbols again.

4 A All right.

5 Q What do we show on this chart?

6 A That chart shows for 1996 the various  
7 sports packages that were carried on each one of those  
8 distant signals. In that particular case on the left-  
9 hand side, those are all super station packages.

10 Q Okay, and on the right-hand chart?

11 A The right-hand chart is the various  
12 network signals that are carried pursuant to 119 and  
13 an indication of the sports packages available on each  
14 one of those signals.

15 Q Okay. Mr. Desser, we could start out with  
16 the super stations.

17 Can you tell me a little bit about the  
18 sports programming that subscribers could get via  
19 satellite through the compulsory license on WTBS?

20 A There are two major professional sports  
21 packages that are on WTBS. I should mention WTBS also  
22 carries some other sports programming as well. The

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1 two major packages are the NBA package, which is a  
2 combination of regular season games and playoff games;  
3 25 regular season games a year and about ten playoff  
4 games a year.

5 In addition, WTBS carries about 120  
6 Atlanta Braves major league baseball contests a year.

7 Q Okay. What about WGN?

8 A WGN carries games of the Chicago White Sox  
9 and the Chicago Cubs. Roughly 150 some-odd Cubs games  
10 and closer to 100 White Sox games. In addition, they  
11 carry games of the NBA Chicago Bulls.

12 I hasten to mention the World Champion  
13 Chicago Bulls. And they also carry some college  
14 product as well.

15 Q Okay. Is there any other sports  
16 programming you'd like to discuss there?

17 A Well, I guess I'd mention WPIX which is  
18 carrying a package of New York Yankees baseball games  
19 which were, I think we're all aware, in the World  
20 Series this past year -- did all right.

21 And each one of these stations -- and I  
22 guess I want to make the point it's not a coincidence

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1 that each one of these signals carries one or more  
2 major sports properties. There isn't a super station  
3 that's carrying an independent station that doesn't  
4 have some major league sports on it.

5 It's one of the building blocks of a super  
6 station.

7 Q Okay. Now if you could go to page 31.  
8 You had described the sports programming that's on  
9 WTBS. And you had said that there are NBA games on  
10 WTBS, correct?

11 A Yes.

12 Q Okay. And there are both regular -- are  
13 there regular season and post season games?

14 A Yes. WTBS, as I mentioned before, carries  
15 25 regular season and ten post season games.

16 Q Okay. And how many subscribers are going  
17 to be able to view these games if they so desired over  
18 satellite carriers by virtue of the compulsory  
19 license?

20 A About four and a half million, though I  
21 think the expectation is that that number is going to  
22 grow.

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1           Q       Okay. Now if we could go to the networks.  
2                    Why don't you tell me a little bit about  
3 the type of sports programming that satellite carrier  
4 subscribers can receive via the networks that are  
5 transmitted over satellite?

6           A       Well, if we just take the first line, the  
7 KUSA signal is going to have the World Series this  
8 year, the NBA finals this year, NFL conference finals,  
9 as well as -- I don't think it's this year, but  
10 they're going to have the Super Bowl I think the  
11 following year, as well as a package of Notre Dame  
12 football and Notre Dame basketball.

13                   There's -- and as you see up and down the  
14 list, each of the networks -- in the case of CBS, you  
15 know, if anyone had any time last night, they probably  
16 saw some of the NCAA tournament; and CBS stations will  
17 be carrying, you know, the Final Four in the next  
18 couple of weeks.

19                   In June, over the Fox affiliate from  
20 Denver, you'll see the Stanley Cup Finals. So what we  
21 have here is, you know, the best sports programming  
22 there is available via these signals, some of the most

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1       promotable, some of the most valuable.

2                       And I didn't even mention, you know, the  
3       Olympics.

4               Q       Okay, Mr. Desser.   Now on these two  
5       charts, the super stations and the network stations,  
6       they are all broadcast stations, correct?

7               A       Yes.

8               Q       Okay.   And what is the value of sports  
9       programming to broadcast stations?

10              A       Well, it's very substantial.   Sports  
11       programming is pretty special in the television  
12       business for a few reasons.   It's live programming.  
13       You know, it's not the kind of thing that's easily  
14       rented at the video store.

15                     It's very topical.   It's the sort of thing  
16       that people will be talking about the day of and the  
17       day after whatever the game is.   It's first run.  
18       These games aren't, you know, old replays of, you  
19       know, something from years ago.

20                     These are first run major league events.  
21       It's, you know, pretty special stuff.

22              Q       Okay.   Well, let's compare -- you talked

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1 about broadcast stations. Satellite carriers also  
2 transmit other signals besides broadcast stations,  
3 correct?

4 A Yes.

5 Q Okay. And do they transmit basic cable  
6 networks?

7 A Yes, they do.

8 Q Okay. Is sports programming on any basic  
9 cable networks?

10 A Yes. It's on -- there are at least a  
11 couple that feature a very heavy diet of sports  
12 programming.

13 Q Okay, if I can take you to page 32 of your  
14 testimony, let's go -- let's use the NBA for a minute  
15 as an example.

16 Well, first, can you identify some of the  
17 cable networks that have sports programming on them?

18 A Sure. ESPN would be one.

19 Q And is that a premium network or a basic?

20 A No, that's a basic cable network. TNT  
21 would be another. It's also a basic cable network.

22 Q Okay. Now is the NBA available on either

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1 of those basic cable networks?

2 A Yes, the NBA is available on TBS. We  
3 license a package of 35 -- I'm sorry, 45 regular  
4 season games and approximately 35 playoff games each  
5 season to TNT.

6 Q Okay, you said TBS first, but you meant  
7 TNT?

8 A I'm sorry, I meant -- yes, sometimes I  
9 confuse them.

10 Q Are you actually involved in that process  
11 of licensing to TNT?

12 A Yes, I'm one of the people at the NBA  
13 that's involved in negotiating for license agreements  
14 with Turner Sports, with NBC.

15 Q Okay. Now do you know what TNT's license  
16 -- average license fee currently is?

17 A Yes. It --

18 Q At the time of your testimony.

19 A Yes, it's approximately 52 cents per  
20 subscriber per month.

21 Q Okay. So for the sports programming and  
22 other programming that's on TNT, how much must a

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1 satellite carrier or cable operator essentially pay to  
2 get that programming?

3 A Roughly 52 cents per subscriber per month.

4 Q Okay. And again, going back to TBS, you  
5 said the NBA is on TBS just like it's on TNT?

6 A Yes.

7 Q And how much must a satellite carrier pay  
8 to get that programming?

9 A Based upon the 119 compulsory license,  
10 it's only 14 cents.

11 Q Okay. So in your view, is that a  
12 substantial difference?

13 A Yes, it is.

14 Q Okay. All right, and if you look at ESPN,  
15 what is ESPN's license fee?

16 A Approximately 68 cents per subscriber per  
17 month.

18 Q Okay. ESPN has what type of sports on it?

19 A ESPN has major league baseball, the NFL,  
20 regular season college basketball. They have NHL  
21 hockey and a wide variety of other sports as well.

22 Q Okay. Similar to some of the sports that

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1 are on these stations?

2 A Many of the same sports, yes.

3 Q Okay. And again, is there a disparity  
4 between the license fee for ESPN and the license fee  
5 for the super stations like WGN that have a number of  
6 different types of sports?

7 A Yes. The WGN rate under the compulsory  
8 license is 14 cents to get the World Champion Chicago  
9 Bulls versus, you know, 68 cents for ESPN.

10 Q A 54 cent difference?

11 A Sounds about right.

12 Q All right. Now have you also actually  
13 negotiated -- besides the cable networks, have you  
14 actually negotiated with the carriers themselves?

15 A Yes, we have.

16 Q Okay. Have you negotiated with DirecTV?

17 A Yes, we have an arrangement with DirecTV,  
18 and we also have an arrangement with PrimeStar.

19 Q Okay. Tell me about your arrangement with  
20 DirecTV.

21 A We have created a package of programming  
22 that was tailored to the DBS market. It's called the

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1 NBA League Pass. And it is as its name suggests, a  
2 ticket to the entire league. And by that, we mean  
3 that virtually every televised game is available to a  
4 DirectTV or PrimeStar subscriber for the payment of a  
5 subscription fee for that package on an à la carte  
6 basis.

7 It includes roughly a thousand games each  
8 season from around the country.

9 Q Okay. And what happens to the revenues  
10 that are received as a result of the sale of the NBA  
11 package -- the league pass?

12 A This was an arrangement reached on an arms  
13 length basis with DirectTV and PrimeStar. We were able  
14 to negotiate over a variety of different elements in  
15 the deal including the split of the revenues. We get  
16 the majority of the revenues that are received by  
17 those carriers when they sell that particular package.

18 In addition, we're able to protect our  
19 local markets where there have been other deals  
20 licensed -- there are black outs in various markets --  
21 so as one of the many other points in our arrangement  
22 with them.

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1 Q Okay. What is the significance of the  
2 information you are providing to the Panel about the  
3 NBA League Pass in your view?

4 A Well, here we have an example of an arms  
5 length transaction that involves signals that, much  
6 like the signals that are contained in the packages  
7 sold by the satellite carriers, signals that began as  
8 local telecasts in a particular market, have been  
9 grouped together in a package and are then sold in  
10 other markets.

11 Much the same happens with the League  
12 Pass. We are taking games which are otherwise only  
13 telecast by local broadcast stations or so-called  
14 regional sports networks -- say Home Team Sports in  
15 the case of the Washington market, and then those  
16 games are then packaged together with games from other  
17 regional sports networks and other local stations and  
18 sold to consumers for a \$149 annual subscription fee.

19 That, I think, is fairly analogous to what  
20 happens in the case of broadcast signals being taken  
21 from one market and sold in other markets as the  
22 satellite carriers do.

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1           Q       And in terms -- if we compare the free  
2 market transaction versus the compulsory transaction,  
3 what's -- is there any disparity in the percentage of  
4 the revenues that are received from the consumers in  
5 terms of what actually the program suppliers receive?

6           A       Yes, there's a significant disparity. As  
7 I mentioned, when we're able to negotiate -- you know,  
8 sports programming is valuable programming. We're  
9 able to negotiate a favorable arrangement with the  
10 satellite carriers. They're happy to have the  
11 programming.

12                       We're happy to sell it to them. It's a  
13 fair market value, I believe, transaction. We get  
14 more than half of the revenue in contrast to 119 where  
15 the copyright holders, you know, are getting anywhere  
16 from 4% to 15% of the retail price.

17           Q       I just have one more topic to discuss with  
18 you, Mr. Desser, and that is the role of exclusivity  
19 in sports programming and the extent to which they --  
20 the rates that you believe should be accorded by this  
21 Panel, okay?

22                       What is exclusivity?

1           A       In the television business, it's very  
2 common for rights to be sold for a particular period  
3 of time or to a particular geographical area or to a  
4 particular medium. And when those transactions take  
5 place, there are various levels of exclusivity that  
6 attach to those agreements.

7                   So for example, when the Washington  
8 Bullets sell a package of their games to Home Team  
9 Sports, they are selling rights to those that they are  
10 not selling to the local broadcast station or to some  
11 other cable network.

12                   There are cases where the NBA may be  
13 selling rights to those games. And when we do that --  
14 you know, take an example of a game being played in  
15 Washington. We would cause the national carrier to  
16 protect the exclusive rights of the local carrier.

17                   So you're I'm sure familiar with black  
18 outs. And one of the hallmarks of sports programming  
19 is that there are black outs in arms length  
20 transactions quite commonly to protect local rights  
21 holders, as they case may be.

22                   In the case -- in the example I just

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1 framed, take a game that is in the national market on  
2 TBS and a game in the local -- that same game in the  
3 local market on Home Team Sports. In that particular  
4 case, TBS is blacked out within the home market. The  
5 product -- that particular game is available  
6 exclusively on Home Team Sports as the result of an  
7 arms length transaction as it relates to cable.

8 Now one of the problems we run into with  
9 119 is there is no similar responsibility with respect  
10 to the satellite carriers to black out and protect  
11 those rights that have been granted to Home Team  
12 Sports for that game on WTBS.

13 So here, the exclusive rights granted to  
14 Home Team Sports are allowed to be diminished as a  
15 result of the fact that 119 doesn't require any kind  
16 of black outs or protections of exclusivities that are  
17 normally otherwise negotiated.

18 Q Okay. And again, can you compare the  
19 position of the satellite carriers in this regard to  
20 the position of cable operators?

21 A Well, cable operators are required under  
22 76.67 of the FCC rules to black out the area proximate

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1 to where a game is taking place on a distant signal.  
2 So in the case of WTBS, it is a distant signal out of  
3 Atlanta.

4 If they televise a game in Washington, the  
5 cable systems that import that signal are responsible  
6 for blacking out the Washington market to protect  
7 local gate or local rights holders. The cable  
8 operators are required to do that.

9 The satellite carriers are not required to  
10 black out the local market in that case.

11 Q In your opinion, what is the effect of  
12 this lack of any requirement of blacking out your  
13 programming on the overall value of your programming  
14 and your ability to sell it in the free market?

15 A It undermines the value of our  
16 programming. It undermines the exclusivity that we  
17 would otherwise be able to convey. As a copyright  
18 holder, one of the things that the law allows is that  
19 you have the ability to decide how your product is  
20 going to be distributed or disseminated.

21 This arrangement abrogates our ability to  
22 make that decision on our own. You know, unless we

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1 were to say well, we won't broadcast our games on  
2 television any more, that would be the only way to get  
3 around it. Obviously that wouldn't be an advantageous  
4 outcome for us or our fans, so we're left to suffer  
5 the consequences of a lack of protection.

6 Q Okay. And in your view, what is the -- do  
7 you have any ability to limit the scope of this  
8 problem by, you know, any kind of negotiations that  
9 you can engage in with the satellite carriers?

10 A Well, when we negotiate with the satellite  
11 carriers on an arms length basis, you know, we can  
12 tailor the markets in which they distribute our  
13 product to protect local rights holders.

14 And you know, I don't think it's necessary  
15 for me to go into talking about the value of local  
16 sports in a local market, but you know, there's a  
17 great deal of promotional value, etc. when you create  
18 an opportunity for somebody to get that program  
19 someplace else.

20 It harms the local rights seller, it harms  
21 the local rights buyer.

22 Q Okay. Now just to conclude, Mr. Dessler,

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1 do you know what the statutory standard is that  
2 governs this Panel's determination?

3 A Yes.

4 Q Okay, can you tell the Panel what in your  
5 belief it is?

6 A The Panel is required to establish fees  
7 that most clearly represent the fair market value of  
8 those transmissions; to figure out what they're really  
9 worth; and to come up with a rate which equals that.

10 Q Okay. And why do you feel that the  
11 diminishment of program value because of the  
12 exclusivity problem should be considered in this  
13 calculation?

14 A Well, because this notion of exclusivity  
15 is so fundamental to the way sports programming is  
16 distributed and -- and frankly, most other forms of  
17 programming as well, it really cuts to the heart of  
18 our business.

19 And it's something that when you look at  
20 the fair market value, you look at the quality of  
21 programming that the satellite carriers have the  
22 opportunity to deliver to customers, the lack of

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1 constraints in terms of the black outs, this is very  
2 valuable programming -- the Super Bowl, the NBA  
3 finals, Seinfeld.

4 This is terrific, terrific stuff. And  
5 they have the opportunity to deliver it. They don't  
6 have to ask permission. They have the opportunity to  
7 decide to do it. We don't have the opportunity to say  
8 no. They don't have to do it. If they decided that,  
9 you know, the prices that you folks came up with were  
10 too high, well they could add more -- more other  
11 channels.

12 They could add additional -- you heard  
13 about the 100 basic cable networks. They could add  
14 more basic cable networks to their line ups if they  
15 thought our price was too high. I should say your  
16 price was too high.

17 Q Mr. Desser, could they add Animal Planet?

18 A They could add Animal Planet.

19 Q Okay, and so do you feel that you've  
20 discussed today some of the factors then that should  
21 go into determining fair market value?

22 A I think that the framework that I've

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1 talked about, the fact that these are major  
2 corporations, that they have, you know, very  
3 substantial margins on the property, the fact that  
4 they don't have to provide black out protection, and  
5 the fact that they've got, you know, among the highest  
6 quality, you know, most sought after sports  
7 programming available speaks to the issue of fair  
8 market value.

9 Q Thank you very much.

10 CHAIRMAN GRIFFITH: All right.

11 Mr. Seiver?

12 MR. SEIVER: I do have cross examination,  
13 Your Honor, that will go I think the rest of the day.  
14 I'm willing to start it now unless you want us to  
15 break for lunch. I could break it into a 15 or 20  
16 minute section and then stop if that's your  
17 preference.

18 CHAIRMAN GRIFFITH: Let's do that so that  
19 we --

20 MR. SEIVER: Very well.

21 CROSS EXAMINATION

22 BY MR. SEIVER:

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1 Q Good afternoon, Mr. Desser.

2 A Good morning.

3 Q I'm John Seiver. I'm counsel for the  
4 Satellite Carriers.

5 I'm going to use some of the charts that  
6 I think Ms. Behan was using with you, and I'm trying  
7 to find the one that has the little dish on it. There  
8 it is.

9 You've been talking about the ownership of  
10 the satellite carriers, and on here you show United  
11 Video/Superstar with TCI and Southern Satellite with  
12 TCI. You saw commencement of operation in '78 and  
13 '76. Now TCI didn't own them in those years, did it?

14 A No, they did not.

15 Q In fact, TCI just bought Superstar -- is  
16 that last year, 1996?

17 A The beginning of the year, yes.

18 Q And have you followed the general stock  
19 market prices of publicly traded companies in the  
20 communications business?

21 A I can't give you price quotes today, but  
22 I do read the newspaper.

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1 Q Well, in the last year, has the Dow Jones,  
2 the Standard & Poors had a fairly substantial  
3 increase?

4 A Yes.

5 Q Do you know what's happened to TCI stock  
6 in the last 12 months?

7 A Yes, but of course -- yes, I do know.

8 Q And what has happened to it?

9 A Well, they've had a number of splits and  
10 -- I shouldn't say splits. They've had some spin  
11 offs. But as a result of that and other matters,  
12 their stock has fallen.

13 Q On an adjusted basis, it's fallen 50%  
14 maybe?

15 A I'm not sure what the percentage is.

16 Q Now you also negotiate with TCI for  
17 selling various sports rights as well, don't you?

18 A We don't negotiate directly with TCI.

19 Q Liberty Sports?

20 A Liberty Media owns an interest in Liberty  
21 Sports. We do have arrangements with various subparts  
22 of Liberty Sports, now known as Fox Sports.

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1 Q When you deal with Liberty Sports, do you  
2 sit down at the table and say before we get going  
3 here, I'm really mad about this super station  
4 business, so you guys are going to pay a little bit of  
5 a penalty before we sell you any more programming?

6 A I don't think that that's usually the way  
7 the conversation begins, but we're certainly, you  
8 know, on record as it relates to compulsory licenses  
9 and so forth.

10 Q So there is a fair market or arms length  
11 transaction way for you to get back at these carriers  
12 that are taking such advantage of you?

13 A Well, they have the ability to distribute  
14 that programming whether, you know, I say yes or no.  
15 So I would say it's not exactly a perfect remedy.

16 Q Now let me ask you about the revenues.  
17 You had mentioned -- and feel free to refer to your  
18 testimony. If I misspeak, it's not intentional. I  
19 just took some notes while you were talking.

20 A Okay.

21 Q United Video/Superstar revenues I think  
22 you gave of about \$260 million and a profit of, I

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1 believe, \$38 million?

2 A That sounds about right. Let me just  
3 double check.

4 Q Sorry, I don't remember the page.

5 A Table 2, yes; has revenues of \$263  
6 million, operating income of \$38.4.

7 Q And I believe for NetLink you had made a  
8 correction of -- it might have been \$160 million, but  
9 you changed it to, what, \$130 million with a profit of  
10 \$19 million?

11 A Let's see. NetLink revenues for 1995 were  
12 \$160 million. That was an increase, not a decrease.

13 Q I'm sorry. And would you agree that  
14 United Video and Superstar, at least for the C-band,  
15 those are the two biggest distributors of packages of  
16 programming?

17 A That United Video and Superstar --

18 Q NetLink, I'm sorry.

19 A Oh, and NetLink.

20 Q Yes.

21 A Certainly United Video is the largest. I  
22 don't think I'd say the two of them are the two

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1 largest.

2 Q Let me just -- well, that's fine. I'll  
3 accept that.

4 PrimeStar's revenues, I think you list at  
5 about \$200 million?

6 A I believe so, yes.

7 Q And AlphaStar's revenues -- and I'm just  
8 giving the ones that you've broken out -- were \$50  
9 million?

10 A Let's see. AlphaStar -- I believe the  
11 figure for AlphaStar was for their parent, Tee-Comm.  
12 Yes, the \$50 million dollars was for Tee-Comm. It's  
13 a Canadian corporation.

14 Q Do you know what the gross revenues are of  
15 the networks, ABC, CBS, and NBC?

16 A I don't offhand.

17 Q Would you accept, subject to check, that  
18 it's about \$9 billion dollars?

19 MS. BEHAN: Do you mean of each of the  
20 networks?

21 MR. SEIVER: All three, yes.

22 THE WITNESS: I don't have a specific

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1 figure in my mind as to what --

2 BY MR. SEIVER:

3 Q Do you think I'm close?

4 A I know it's certainly in the billions of  
5 dollars.

6 Q How about for Fox? Do you know what Fox  
7 is -- revenues?

8 A Not offhand, no.

9 Q Do you know whether the operating profit  
10 of the three combined networks is about \$600 million?  
11 This is the operating profit.

12 A I'm familiar generally that the networks,  
13 you know, have a combined operating profit, but I  
14 couldn't tell you what it is for a particular year  
15 offhand.

16 Q And you're also aware that in -- I believe  
17 it was in the last year or two, and you can correct me  
18 if I'm wrong, that Fox -- not KDVR itself, but Fox the  
19 network, recently bid -- was it \$1.6 billion for a  
20 package for the NFL to outbid CBS?

21 A \$1.6 sounds about right. I think on a per  
22 year basis it was \$395 million for four years. So

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1 yes, that's about right.

2 Q And that's money that's paid directly to  
3 Sports Claimants, and I believe the ones that you're  
4 testifying on behalf of, is that right?

5 A Well, that's money that's paid to the NFL.

6 Q And NFL is one of the Joint Sports  
7 Claimants?

8 A I don't think they are.

9 Q The NFL is not here today, to your  
10 knowledge, in this room?

11 A I don't believe so.

12 Q The NBA is here?

13 A I'm here.

14 Q Major League Baseball?

15 A Yes.

16 Q National Hockey League?

17 A Yes.

18 Q And you've said more than once during your  
19 testimony that the compulsory license fees that these  
20 entities pay is far below the market value that you  
21 think should be ascribed to those particular signals,  
22 is that right?

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1 A Yes.

2 Q But the NFL's not here today chiming in  
3 and saying you're right, go get 'em.

4 A There are a lot of people who aren't here  
5 today.

6 Q It's interesting. There's another entity  
7 that's conspicuously absent from your side of the  
8 aisle today, isn't there -- one of the networks that's  
9 on there, one of the broadcast networks that's absent?

10 A I don't know. I wasn't here for roll  
11 call.

12 Q Well, I'll ask you to accept, and I will  
13 be corrected if I'm wrong, but the three commercial  
14 networks of NBC, CBS, and ABC are represented today by  
15 Mr. Ossola; but the Fox network is not over there  
16 asking for an increase in compulsory license fees.

17 Does that surprise you?

18 A In light of what's going on with ASkyB, I  
19 don't know if that surprises me or not.

20 Q And what is going on with ASkyB?

21 A I don't know that I'm the expert in that  
22 transaction, but there are issues as relate -- their

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1       desire to carry local signals.

2               Q       And that's the reason they're not asking  
3       for the royalties to go up on the -- so they can  
4       collect more in a distribution proceeding?

5               A       I think you'd have to ask them what their  
6       reason for not being here is.

7               Q       But that -- you suspect that's the reason  
8       why they're not here; they've got some other agenda,  
9       is that it, besides increasing the royalty payments?

10              A       There's a possibility. I don't know.

11              Q       How much money is at stake in this  
12       proceeding, do you know?

13              A       Today?

14              Q       Today, as we stand here, I believe you had  
15       talked about the statements of account that were  
16       recently filed for all the satellite carriers, all  
17       these carriers for all their signals and all the  
18       payments. Was it \$26 million dollars for six months?

19              A       Well, I recall that it was \$13½ million  
20       for the first half of the year. And given that there  
21       has been some growth since then, I would say that the  
22       total for the year is going to be more than \$26

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1 million.

2 Q And if -- do you know what the rates are  
3 that are being proposed by your client, Joint Sports  
4 Claimants, in this proceeding are?

5 A Yes.

6 Q Have you calculated out if those had been  
7 the rates what would have been the total that was paid  
8 in?

9 A I haven't done that math, no.

10 Q But whatever is paid in, your group, the  
11 NBA, as well as the other members of the Joint Sports  
12 Claimants -- I don't know about the NFL -- would be  
13 able to come back in a satellite distribution  
14 proceeding, not a rate adjustment, and claim some  
15 portion of those royalties; am I right?

16 A Yes.

17 Q Well, let's talk about the \$13 million  
18 dollars since I believe -- and correct me if I'm wrong  
19 -- that the parties on the other side have just  
20 recently filed notices of intent to participate in the  
21 distribution of the satellite carrier royalty  
22 proceeding.

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1 Are you familiar with the distribution  
2 proceedings?

3 A I know that those proceedings take place.  
4 I'm not precisely sure when the next one is and what  
5 the schedule is, no.

6 Q Do you know what percentage Joint Sports  
7 Claimants gets of that \$13.5 million that's paid in?

8 MS. BEHAN: I'm going to object to this  
9 line of questioning. I don't think it's relevant, and  
10 I don't think it's appropriate to bring that  
11 information into this proceeding.

12 CHAIRMAN GRIFFITH: The objection's  
13 overruled.

14 MR. GARRETT: Your Honor, these  
15 proceedings have been going on for over 20 years here.  
16 And there's one thing that has been sacred in these  
17 proceedings, and that has been the internal settlement  
18 agreements among all the parties here.

19 It's very difficult for us to arrive at  
20 settlements if we think that terms of those  
21 settlements are going to have to be disclosed whenever  
22 somebody decides he thinks he'd like to know about it

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1 on cross examination.

2 We have strict confidentiality agreements  
3 that cover those settlements. Questions in the past  
4 -- you know, in the 20 years that these proceedings  
5 have been going on, I cannot recall a single instance  
6 where anyone has ever been allowed to cross examine or  
7 elicit information concerning the internal settlements  
8 here.

9 And I would --

10 CHAIRMAN GRIFFITH: Have all of the  
11 distributions been by virtue of settlement agreements?

12 MR. GARRETT: The only one that -- so far  
13 there has been one consolidated proceeding governing  
14 the years 1988, 1989, 1990, and I believe '91.  
15 Actually, it's '89, '90, and '91. That one was  
16 settled among all of the parties here. We have no  
17 settlement agreement governing any of the future  
18 years.

19 Certainly we have none covering the years  
20 that your particular rate will be in effect. And  
21 again, I believe that it's an inappropriate question.  
22 I would respectfully ask the Panel --

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1 MR. SEIVER: If I may be heard?

2 CHAIRMAN GRIFFITH: Yes, please.

3 MR. SEIVER: I understand Mr. Garrett's  
4 point, and it kind of puts Satellite Carriers in a  
5 precarious position. We have Mr. Desser testifying  
6 that this is just a horror, this low payment of  
7 royalties to only super stations. And we've seen  
8 these numbers.

9 Now he doesn't get that \$13 million. He  
10 gets some percentage of that. And I need to know what  
11 percentage that is and what kind of money he's talking  
12 about that we're trying to see for the raising of the  
13 royalty rates overall. I want to put it in  
14 perspective that the billions that Sports gets from  
15 everybody else compared to the few millions they may  
16 get here really make it -- what is this argument  
17 about?

18 I do think it's relevant. Now, if there's  
19 going to be a problem with -- in the cable  
20 distribution proceeding, that's all been public. The  
21 numbers you can see. We know what the numbers are in  
22 the fund, the size of the cable fund; and they've all

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1       been arbitrated in recent years and hotly disputed.

2               These owners on this side fight very hard  
3       to get chunks of that money. It's about \$160 million  
4       dollars a year fund. This one they did settle. The  
5       prior distribution was settled, and I remember trying  
6       to get that information. And they had it paid out --  
7       it was nothing public.

8               It was paid to a common agent who then  
9       distributed it to the owners. And that handicaps you.  
10      When I have someone say that this is not enough money,  
11      I don't even know what NBA gets out of that because  
12      Joints Sports takes some, NBA takes some. NFL I guess  
13      is not going to get any.

14              Major League Baseball gets some. And  
15      trying to put his testimony in perspective is -- it's  
16      a challenge.

17              CHAIRMAN GRIFFITH:   Mr. Garrett, what  
18      we're inquiring -- what to inquire about is the  
19      confidentiality which you referred to as a result of  
20      the statutory provision of some type, or is that  
21      simply a settlement and agreement between the  
22      respective parties to keep the information

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1 confidential?

2 MR. GARRETT: It's the latter, Your Honor.

3 CHAIRMAN GRIFFITH: All right.

4 MR. SEIVER: There is a protective order  
5 governing this proceeding that allows information that  
6 is confidential to be submitted and maintained and we  
7 can close the door and seal the record.

8 MR. SEIVER: Your Honor, --

9 CHAIRMAN GRIFFITH: Do you want to be  
10 heard public?

11 Please.

12 MR. GARRETT: I don't want to handicap my  
13 good friend Mr. Seiver here. If he wants to use some  
14 type of a percentage, as he alluded to, there has  
15 recently been an allocation and a decision about cable  
16 royalty funds. He's free to use that percentage and  
17 proceed with that.

18 What I'm concerned about is having him go  
19 back to a settlement that we all negotiated a couple  
20 of years ago and really there's no relevance to what's  
21 going to happen during the years that your rate is in  
22 effect. There's really no need for him to inquire

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1 into something that the rest of the parties here all  
2 consider to be quite sensitive information.

3 If he wants to go along with this  
4 hypothetical argument, let him use -- with the number  
5 that was actually determined in the last proceeding.

6 CHAIRMAN GRIFFITH: How about a  
7 percentage?

8 MR. SEIVER: One last -- I will, Your  
9 Honor. But just so you'll understand, there's a big  
10 difference in the cable distribution proceeding from  
11 the satellite distribution proceeding even though very  
12 many of the same signals, the broadcast networks, do  
13 not participate at all in cable distribution.

14 They participated in the satellite  
15 distribution. There was a big fight over that. That  
16 was resolved that they could draw, and then they  
17 settled. So I don't know whether -- I think Mr.  
18 Garrett's percentage for Major League Sports was  
19 somewhere in the neighborhood of 28 or 30% of cable.

20 MR. GARRETT: That's a fair --

21 MR. SEIVER: I don't know. I guess I  
22 could take that as a top number and only assume that

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1 it's reduced; unless, of course, there's an argument  
2 that sports is more valuable to satellite subscribers  
3 than to cable, which I don't know --

4 CHAIRMAN GRIFFITH: If I understand Mr.  
5 Garrett, you don't object to him referring to a  
6 percentage?

7 MR. GARRETT: No. I mean, if he wants to  
8 refer to the percentage that was actually determined  
9 in the last litigative proceeding, that's fine.

10 MR. SEIVER: Cable proceedings.

11 MR. GARRETT: If he wants -- yeah. Well,  
12 you can assume that maybe it's increased too. I don't  
13 mind that.

14 I don't care what you assume. As long as  
15 you don't inquire into our confidential agreement.

16 MS. WOODS: Your Honor?

17 CHAIRMAN GRIFFITH: Ms. Woods?

18 MS. WOODS: Your Honor, Michelle Woods for  
19 the Public Television Claimants.

20 I just heard Mr. Seiver say he doesn't  
21 hear any of our objections. We would like to be on  
22 record as joining in the objection.

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1 MR. SEIVER: I asked for that.

2 CHAIRMAN GRIFFITH: All right.

3 MR. LANE: Your Honor, Dennis Lane for the  
4 Program Suppliers.

5 I would say this -- we probably fought  
6 this issue more than anybody in the 20 years, and  
7 many, many cases, and we've been on record many times  
8 supporting this principle; and we think it's very,  
9 very important to getting settlements and the whole  
10 process.

11 CHAIRMAN GRIFFITH: Right.

12 MS. BEHAN: Your Honor, if I could just  
13 say also the basic policies in federal courts that  
14 keep this type of evidence out as substantive evidence  
15 because of the problematic nature of its relevancy I  
16 think are the same principles that underlie the  
17 position that we've taken here today.

18 CHAIRMAN GRIFFITH: Right, okay.

19 Normally settlement negotiations or the  
20 results of settlements are not admissible into  
21 evidence even at the state court where I came from.

22 What are you wanting to do?

1 MR. SEIVER: Well, Your Honor, I think I'm  
2 not going to belabor the point any longer. I don't  
3 want to jeopardize the free market negotiations over  
4 our compulsory fees. I will look at it from the  
5 various standpoints of the owners that there is some  
6 percentage, and then Mr. Dessser's point, NBA gets some  
7 further reduced percentage which we'll never know, I  
8 guess, in this proceeding, of that -- the money that  
9 went to -- the 30% of the \$13.5 million, and then  
10 funds are spread out.

11 CHAIRMAN GRIFFITH: Well, they have to pay  
12 Michael Jordan, you know.

13 MR. SEIVER: That's a question I had here.  
14 Will the \$13.5 million pay Mr. Jordan?

15 THE WITNESS: I'm afraid not.

16 MR. SEIVER: 100% distribution to sports  
17 for Mr. Jordan.

18 CHAIRMAN GRIFFITH: Why don't we take our  
19 lunch recess? Let's take -- ask you to be back at  
20 2:00. Thank you.

21 (Whereupon, the proceedings recessed for  
22 lunch at 12:54 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (2:01 p.m.)

3 CHAIRMAN GRIFFITH: All right, ladies and  
4 gentlemen, if we're ready to proceed, please.

5 MR. SEIVER: Thank you.

6 CROSS EXAMINATION (con't.)

7 MR. SEIVER: Good afternoon again, Mr.  
8 Desser. I trust you had a nice lunch?

9 THE WITNESS: It was acceptable.

10 CHAIRMAN GRIFFITH: Fair.

11 (Laughter.)

12 BY MR. SEIVER:

13 Q And Mr. Desser, I trust you didn't talk  
14 with anybody about your testimony, did you, during  
15 lunch?

16 A About my testimony?

17 Q About this testimony that's going on right  
18 now.

19 A Not any substantive conversation, no.

20 Q All right, thank you.

21 We were talking about this chart here with  
22 the satellite carriers, and we were going through some

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1 ownership -- as an item, if you would take a look at  
2 the ownership of PrimeStar, GE American  
3 Communications.

4 A Yes.

5 Q And they are a subsidiary of General  
6 Electric?

7 A Yes.

8 Q General Electric also owns one of the  
9 broadcast networks, don't they?

10 A Yes.

11 Q And which network is that?

12 A NBC.

13 Q And NBC also has interest in General  
14 Electric by virtue of that relationship in some cable  
15 networks too, is that right?

16 A Yes.

17 Q Do you know which ones?

18 A MS-NBC, C-NBC, and I believe a partial  
19 interest in some of the Rainbow networks as well.

20 Q Do any of those cable networks show -- we  
21 know NBC shows sports programming. Do any of the  
22 other cable networks show sports programming?

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1           A       Those networks don't generally show live  
2 sports programming. They may show some sports news.  
3 In the case of some of the Rainbow networks, some of  
4 those include regional sports networks that do carry  
5 sports programming.

6           Q       Actually, NBC carried -- is it the NBA  
7 finals -- last season, '96, is that correct?

8           A       Yes, they did.

9           Q       And they carried that live?

10          A       Yes, they did.

11          Q       Didn't NBC network, during the course of  
12 that telecast or shortly thereafter, direct viewers to  
13 go to watch interviews on C-NBC?

14          A       Yes, there was a post-game show I believe  
15 on C-NBC for one or two of the games.

16          Q       Is that something that you allowed them to  
17 do or licensed them to do?

18          A       Yes.

19          Q       And there was no problem as a concern from  
20 NBC that their affiliates would be having people turn  
21 the channel to a cable network?

22          A       That was an issue, if it was, as between

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1 NBC and its affiliates, not between them and us.

2 Q They didn't have to pay you anything extra  
3 for that privilege?

4 A I'm not familiar with the term of that  
5 particular agreement, so I can't tell you for sure.

6 Q And do you know if that upset the  
7 affiliates that were showing the game previously?

8 A I remember there being issues that came  
9 out of that. I don't recall precisely what they were.

10 Q Now one of the other networks, ABC, also  
11 has interests in cable networks, am I right?

12 A Yes.

13 Q Do you know what those are?

14 A ESPN, ESPN-2, ESPN News, Lifetime. There  
15 may be others.

16 Q At least as far as ESPN, ESPN-2, and ESPN  
17 News, that tends to be -- well, live sports  
18 programming at least on ESPN, is that right?

19 A Well, there's live and taped programming  
20 on ESPN.

21 Q On both?

22 A Uh-huh.

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1 Q ESPN and ESPN-2.

2 Do you know, does CBS have any interest in  
3 these sports networks?

4 A Yes, I believe CBS owns an interest in  
5 Midwest Sports Channel I recall.

6 Q How about Fox; does Fox have any interest  
7 in the cable network sports channels?

8 A Yes, Fox has interest in those Liberty  
9 affiliated regional sports networks we discussed this  
10 morning.

11 Q So the networks that we've spoken about --  
12 maybe CBS only with the Midwest Sports Channel, at  
13 least when they come knocking on your door to make a  
14 deal, the networks have the option of either bidding  
15 for the networks or bidding for their cable networks,  
16 isn't that right?

17 A Well, generally the networks bid for the  
18 network programming and the regional networks do their  
19 own bidding for that programming.

20 MR. SEIVER: I'd like to mark as an  
21 exhibit -- let me make sure I've got the right one.  
22 I'd like to mark as -- what exhibit are we up to? 3-

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1 X?

2 3-X, a document that's Broadcasting and  
3 Cable, May 13 issue which is an excerpt.

4 Mr. Desser, I'm handing you this exhibit  
5 -- I'm showing you what I've done.

6 (Whereupon, the above-  
7 referenced document was marked  
8 as SBCA Exhibit 3-X for  
9 identification.)

10 MS. BEHAN: Excuse me. I'd like to make  
11 an objection.

12 I think you said this was an excerpt?

13 MR. SEIVER: Yes.

14 MS. BEHAN: And under the rules, if you  
15 provide an excerpt, we're entitled to the entire  
16 article.

17 MR. SEIVER: Well, the article's in its  
18 entirety. The excerpt's from a magazine.

19 MS. BEHAN: Oh, the excerpt's from a  
20 magazine?

21 MR. SEIVER: Sorry, yes.

22 CHAIRMAN GRIFFITH: Okay.

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1 MR. SEIVER: And from yesterday's ruling,  
2 unless the Court is interested in having official  
3 notice of this or there's no objection, I will only  
4 ask him some questions about it.

5 BY MR. SEIVER:

6 Q Have you had a chance to look through it,  
7 Mr. Desser?

8 A I have paged through it. I had not read  
9 through it, and there's a great deal here.

10 Q Well, I'll direct you what I think is  
11 necessary, and you can tell me if you've got a problem  
12 with it.

13 But this is the May 13 1996 edition. You  
14 mentioned earlier in your testimony that you read the  
15 trades. Is this one of the trade magazines that you  
16 would have occasion to read?

17 A Yes.

18 Q And this obviously, the cover story, was  
19 about sports, "TV's \$3.5 Billion Addiction: Sports."  
20 And I wanted you to look in particular on page 39.  
21 Not 39 page of the exhibit. That's the page with the  
22 number 39. And it says on the box there the price of

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1 rights.

2 Let's look at the NFL. I know they're not  
3 here today, but they are sports programming. Fox paid  
4 -- remember we talked about the \$1.6 billion, \$1.58  
5 billion for the rights in '97 and '98. Does that also  
6 show that NBC paid \$868 million, ABC \$920, ESPN \$524  
7 million, and TNT \$496 million?

8 Do you see that?

9 A I see the box you're talking about.

10 Q Then let's look over towards your clients,  
11 the National Basketball Association. NBC did for \$750  
12 million. And do you know if the Turner, for \$350  
13 million, is that TBS or TNT or both?

14 A Both.

15 Q So WTBS which is one of the super stations  
16 that we've been talking about with the low royalty is  
17 also owned by Mr. Turner -- well, Time Warner now; but  
18 Mr. Turner at one time owned TBS and TNT together, is  
19 that right?

20 A Turner Broadcast.

21 Q Turner Broadcast owned those both. So he  
22 had a broadcast super station and a cable network?

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1 A Yes, that's correct.

2 Q Do you know if Mr. Turner had problems  
3 with the compulsory license fees that were paid for  
4 uplinking and distributing his super stations, WTBS?

5 A Not that I recall.

6 Q He would be what you call an aggressive  
7 super station, wouldn't you?

8 A I don't know if I'd use that phraseology.

9 Q Have you heard the expression aggressive  
10 or passive for super stations?

11 A I've heard the expression passive. I  
12 haven't heard the expression aggressive.

13 Q Well, Mr. Turner wasn't passive, was he?

14 A I don't want to characterize Mr. Turner.

15 Q As far as super stations, you've  
16 negotiated -- I presume you negotiated this deal. I  
17 mean, wasn't that your job?

18 A Yes, that's part of my job.

19 Q And Mr. Turner came to the table with \$350  
20 million dollars; but for whatever reason, NBC came to  
21 the table with \$750 million dollars, is that right?

22 A You could say that.

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1           Q       And I was looking at the other sports,  
2 Major League Baseball which is here today, Fox chipped  
3 in \$575 million; NBC \$475; ESPN \$455; and then Fox  
4 again with Liberty \$172. And let's look over at --

5           JUDGE GULIN:     I'm sorry, is that a  
6 question?

7           MR. SEIVER:     I'm asking if he sees those  
8 numbers.

9           Yes, Your Honor; I'm sorry.

10          JUDGE GULIN:     I'm certain he sees the  
11 numbers. Does he agree with the numbers I guess is  
12 the question.

13          MR. SEIVER:     Well, that would be my next  
14 one.

15          BY MR. SEIVER:

16          Q       Do you understand if those represent deals  
17 that were made in those particular sports?

18          A       Well, I know that there are various deals.  
19 For the most part, I cannot confirm or deny the  
20 particular numbers that are set forth here. I don't  
21 have personal knowledge of the amounts of those  
22 agreements.

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1 Q You have no reason to disbelieve that this  
2 is reported inaccurately, do you, in Broadcasting &  
3 Cable magazine?

4 A Well, I do notice that there is some  
5 rounding and there are a great number of terms that  
6 are not included here.

7 Q Well, let me ask you about the Olympics.  
8 Are you familiar with how the Olympics are  
9 sold to the networks?

10 A I'm familiar that the Olympics are sold to  
11 the networks.

12 Q None of the cable networks or super  
13 stations have been buying the rights to the Olympics,  
14 to your knowledge?

15 A Well, TNT is carrying the winter Olympics.

16 Q So they were left off of this list?

17 A That may very well be.

18 Q You know, as far as the biddings are  
19 concerned, the networks have done pretty well as far  
20 as getting your attention and selling sports rights to  
21 -- and buying sports rights from members of the Joint  
22 Sports Claimants.

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1                   Would that be fair to say?

2                   A       I don't know what you mean by that.

3                   Q       Well, we put this other exhibit up here  
4 with major sports programming and listed super  
5 stations and network stations and everything that's on  
6 them. And we have quite a bit up there. And I  
7 thought you were touting that this is pretty heavily  
8 sports for networks and super stations.

9                   A       Yes, I think there's quite a bit of very  
10 substantial sports programming carried on the networks  
11 and on those super stations.

12                  Q       And that means that these particular  
13 networks or super stations, whomever, are coming to  
14 the sports rights owners such as yourself or members  
15 of the Joint Sports Claimants and paying money,  
16 whether it be the exact numbers listed here or  
17 something else, to get the rights; isn't that right?

18                  A       There are arms length negotiations between  
19 the networks and various of the sports leagues.  
20 However, I should note that the Joints Sports  
21 Claimants do not negotiate with the networks.

22                  Q       I didn't mean that. I meant members of

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1 the Joint Sports Claimants -- MLB, NHL.

2 A Yes.

3 Q And in the context then of this particular  
4 transaction, this is a fair market transaction --  
5 there's no compulsion, is there, to sell to one or not  
6 sell to the other?

7 A No, it's an arms length transaction.

8 Q And you can all come into the room and sit  
9 them down and have a beauty contest and whoever wins  
10 pays the most money or whatever -- gets the  
11 programming, is that right?

12 A I wouldn't characterize the negotiation as  
13 taking place in that manner, but I would call it an  
14 arms length transaction.

15 Q There's nothing that's not market value  
16 about that?

17 A There's nothing that comes to mind at the  
18 moment that isn't marketplace value about that.

19 Q And this is where your valuation expertise  
20 comes to bare, is that right, in stewarding or  
21 sheparding these transactions through and on behalf of  
22 NBA?

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1 A Yes.

2 Q Now, does the NBA have the national rights  
3 to all of the games that are played by the NBA member  
4 teams?

5 A Yes.

6 Q Who has the local rights?

7 A The right to license games in the local  
8 market involving a particular club are -- have been  
9 allocated by the members of the NBA to individual  
10 clubs for those individual clubs in a local market to  
11 negotiate for carriage arrangements with local  
12 broadcasters and regional sports networks, as the case  
13 may be.

14 Q Now do you know in your experience how the  
15 local clubs in negotiating with the local stations  
16 feel -- have a position with respect to the sale of  
17 their programming to a super station?

18 A Can you give that to me --

19 Q Well, let me -- okay, I'll stop beating  
20 around the bush.

21 Didn't the Bulls, the Chicago flagship  
22 World Champion Bulls, and WGN, one of the flagship

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1 super stations, sue the NBA because you would not  
2 permit the Bulls to sell the local games in the  
3 quantity they wanted to sell to WGN just in the last  
4 years with a decision in September?

5 A There has been litigation between the  
6 Bulls, WGN, and the NBA.

7 Q Did I set the parties in the right  
8 perspective of who sued who?

9 A The original action was brought by the  
10 Bulls and WGN. There were various, you know,  
11 counterclaims and the likes. So at any given point in  
12 time, I'm not sure it's fair to characterize one  
13 particular party as the defendant or the plaintiff.

14 Q Well, we have a --

15 MS. BEHAN: Your Honor, if I could just  
16 ask that he allow the witness to finish his answer  
17 before he starts another.

18 MR. SEIVER: I'm sorry.

19 CHAIRMAN GRIFFITH: Have you finished your  
20 answer?

21 THE WITNESS: Yes, I have.

22 CHAIRMAN GRIFFITH: All right.

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1 MR. SEIVER: Let me mark as SBCA 4-X --  
2 thank you.

3 This is the decision in Chicago  
4 Professional Sports Limited Partnership and WGN  
5 Continental Broadcasting Company, Plaintiffs,  
6 Appellees, Cross Appellants, v. The National  
7 Basketball Association, Defendant, Appellant, 05593,  
8 decided December 10, 1996.

9 (Whereupon, the above-  
10 referenced document was marked  
11 as SBCA Exhibit 4-X for  
12 identification.)

13 BY MR. SEIVER:

14 Q Mr. Desser, are you familiar with this  
15 decision?

16 A I'm generally familiar with it. I'm not  
17 an attorney.

18 Q But you know what was going on in this  
19 litigation. This is your business, selling rights to  
20 the basketball games, isn't it?

21 A This was an important litigation.

22 Q Well, let me -- turn now to page 595. I

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1 want to just ask you if you understood here. Top of  
2 page 595 in the right-hand column, second line.

3 "The Bulls' popularity makes WGN  
4 attractive to these cable systems; the large audience  
5 makes WGN attractive to the Bulls."

6 I want to ask you about that.

7 A I don't have the particular line that  
8 you're referencing in my sight. Can you point it out?

9 Q Well, I'll tell you what. Why don't you  
10 start at the bottom of the -- well, I guess it's the  
11 third paragraph.

12 MR. SEIVER: May I approach the witness?

13 CHAIRMAN GRIFFITH: That's fine.

14 BY MR. SEIVER:

15 Q Why don't we start down here where it says  
16 the Bulls.

17 "The Bulls want to broadcast more of their  
18 games over WGN television, a 'super station', carried  
19 on cable systems nationwide. The Bulls' popularity  
20 makes WGN attractive to these cable systems; the large  
21 audience makes WGN attractive to the Bulls."

22 Were you aware that the Bulls wanted to do

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1 this particular deal with WGN?

2 A I'm aware that the Bulls did a deal with  
3 WGN.

4 Q Were you aware that the NBA objected to  
5 that and forbid the Bulls from selling as many games  
6 as they wanted to which resulted in this litigation?

7 A I don't think I adopt your  
8 characterization. I'm aware of the litigation. I'm  
9 aware that there was a dispute as between us and the  
10 Bulls and WGN about how many games they had the rights  
11 to distribute -- could distribute under under league  
12 rules.

13 Those are the rules that bind the teams  
14 and the league together in a partnership, and that is  
15 what the litigation was about.

16 Q Mr. Desser, how many games are in a  
17 basketball season?

18 A In a regular NBA season, there are 1,189.

19 Q I'm sorry, how many -- for one team like  
20 the Bulls?

21 A Each team plays 82 regular season games.

22 Q And I direct you on to the fourth column

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1 now on page 595. I believe there's a -- both sides  
2 appeal. The Bulls want to broadcast 41 games per year  
3 over WGN. I presume that would be half their -- half  
4 the season, is that right?

5 A That's half of 82.

6 Q The NBA contends, that's you, that the  
7 anti-trust laws allow it to fix a lower number, 15 or  
8 20, and to collect the tax it propose which is decided  
9 -- mentioned up above -- the tax on games which are  
10 broadcast to a national audience.

11 Is this tax on a national audience  
12 something that you came up with in your position with  
13 the NBA?

14 A There was a formula for a super station  
15 fee that I was involved, along with a number of other  
16 individuals at the NBA, with developing.

17 Q A compulsory fee?

18 A A compulsory fee in the context of an NBA  
19 member team distributing games into the national  
20 marketplace that under the rules of the association  
21 they had agreed not to so distribute.

22 Q How did the NBA get the authority to

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1 restrict the output of all the member teams in the  
2 NBA?

3 A I don't think that's the proper framing of  
4 the question.

5 Q Well, if you can't answer it, that's fine.  
6 Is there an anti-trust exemption?

7 A Well, there are a variety of anti-trust  
8 issues and legal questions and questions of the  
9 characterization of the enterprise which I am not the  
10 expert in.

11 Q I have a very simple question for you and  
12 because I'm just repeating what was in the case.

13 It says the NBA contended -- that's your  
14 business -- that the anti-trust laws allow it to fix  
15 a lower number, 15 or 20, and to collect this tax.

16 Is it by virtue of the anti-trust laws --  
17 I'm trying to find out if there's an exemption or some  
18 other application of the anti-trust laws that allows  
19 you to restrict the output of your member teams?

20 MS. BEHAN: Your Honor, I'm going to  
21 object to this line of questioning.

22 Not only is it beyond the scope, but the

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1 questions that he's now asking are legal questions.  
2 He has said that he's not a lawyer. He's asking for  
3 conclusions of law. I don't think that it's tied  
4 closely enough in any case to the direct examination,  
5 but I think it's particularly far afield when he's  
6 asking non-lawyer conclusions of law.

7 CHAIRMAN GRIFFITH: Okay.

8 MR. SEIVER: May I be heard?

9 CHAIRMAN GRIFFITH: That's fine.

10 MR. SEIVER: The problem that I have is  
11 Mr. Desser testified a lot about exclusivity and  
12 that's why they're so upset when a super station takes  
13 a station into another market. And my point that I'm  
14 trying to establish is that that's not a free market  
15 right that they have to control that.

16 There's a statutory exemption which allows  
17 them to control this output. He's complaining here in  
18 this proceeding about the statutory compulsory  
19 license; yet really, it's only because he has a  
20 statutory right to even go out and get more money and  
21 restrict his team's output.

22 I'm trying to compare the two; why he

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1 likes one and doesn't like the other.

2 CHAIRMAN GRIFFITH: But you're asking him  
3 if the basis of this particular -- of the position of  
4 the NBA in this particular case is the result of some  
5 anti-trust exemption or such, and I think that's a  
6 legal question and the objection is sustained.

7 MR. SEIVER: Yes, I didn't mean that. Let  
8 me ask --

9 BY MR. SEIVER:

10 Q Mr. Dessler, in your position at the NBA --  
11 and I believe you testified -- or in your curriculum  
12 vitae, you said you are responsible for making  
13 national and local contracts for the distribution of  
14 the NBA games as well as for broadcast TV and cable  
15 networks, is that right?

16 A No, that's not what I said.

17 Q In your curriculum vitae, your  
18 responsibilities included the administration of all  
19 aspects of the league's national and local cable and  
20 broadcast television arrangements. Is that not  
21 accurate?

22 A At the time -- at one point in my career.

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1 I think that references 1984.

2 Q You don't do that anymore?

3 A No.

4 Q I'm sorry.

5 A I'm not responsible for local television.

6 Q I thought your testimony today was -- oh,  
7 you're responsible?

8 A I said I'm not responsible for local  
9 television.

10 Q I see. So you have no idea about --  
11 you're really not familiar with this dispute then at  
12 all with the Bulls on a personal involvement?

13 MS. BEHAN: I object to this.

14 That's not what he testified. He's now,  
15 I think, trying to mislead the witness. And I just  
16 want to object generally to this line of questioning  
17 not only on the grounds before, but he's asking him  
18 the personal positions of the NBA and the Bulls in  
19 litigation.

20 I mean, there may be attorney-client  
21 privilege issues here. It's not this litigation. If  
22 it were this litigation or if it were closely related,

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1 you know, I could see a broader scope. But I frankly  
2 think that this line of questioning should end right  
3 now, and I ask that it do so.

4 MR. SEIVER: I have some more questions,  
5 and this all goes back to Mr. Dessser's testimony and  
6 complaining about the exclusivity that he loses with  
7 these super stations, his ability to license these  
8 games elsewhere, the complaints about the compulsory  
9 license.

10 Now we find out there's a super station  
11 tax that they collect that we haven't heard about  
12 before. I think I'm entitled to. If he doesn't know,  
13 he doesn't know. But I don't think this line of  
14 questioning is really over.

15 MS. BEHAN: What I'm saying is it's one  
16 thing to ask about the super station tax; it's another  
17 to spend, you know, all of this time on a litigation  
18 and how these issues came up in the litigation. I  
19 think he should answer what he knows about the  
20 relevant economics of the NBA and of all of the  
21 element issues in this case.

22 I don't think that the dispute, the

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1 litigation dispute, is something that's particularly  
2 pertinent here.

3 CHAIRMAN GRIFFITH: All right.

4 The objection is sustained.

5 However, let me go to the other hand. We  
6 reserve to you the right to explore the issues  
7 concerning exclusivity.

8 MR. SEIVER: Thank you.

9 CHAIRMAN GRIFFITH: But not in a manner in  
10 which you're presently doing it.

11 MR. SEIVER: Very well. I'll turn away  
12 from the case.

13 CHAIRMAN GRIFFITH: All right.

14 MR. SEIVER: I was hoping this would help  
15 us as far as giving a framework of common ground to  
16 discuss the issue.

17 BY MR. SEIVER:

18 Q Are you aware of how the litigation was  
19 resolved with the Bulls being able to sell the 15 or  
20 20 games to WGN to be shown on that super station?

21 A Yes.

22 Q Now you, again -- are you not responsible

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1 for making or allowing that agreement to have  
2 occurred?

3 A I was one of the people involved in  
4 reaching that agreement.

5 Q So as a result of this decision -- did you  
6 understand that this decision allowed you to restrict  
7 the output, is that right, of the Bulls? Is that --  
8 it removed an injunction. I mean, is that what you  
9 understood it to do?

10 MR. OSSOLA: Your Honor, this is Charles  
11 Ossola for the Commercial Networks.

12 He's still continuing to ask this witness  
13 his --

14 MR. SEIVER: I'm sorry, I'll withdraw it,  
15 I'll withdraw it.

16 MR. OSSOLA: -- interpretation.

17 I said I'll withdraw it, Charles.

18 CHAIRMAN GRIFFITH: All right, he  
19 withdraws it and go ahead.

20 BY MR. SEIVER:

21 Q What ever happened, you did reach an  
22 agreement with the Bulls and WGN about the continued

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1 showing of Bulls games on WGN, is that right?

2 A Yes.

3 Q And was it 12 games for the remainder of  
4 the season?

5 A I believe that's the number for this  
6 season.

7 Q And 15 games for the next two seasons,  
8 three seasons?

9 A Several seasons, yes.

10 Q So not the 41 home games, but 12 or 15?

11 A I don't think there was any discussion of  
12 41 home games.

13 Q Or 41 games; I'm sorry.

14 A There was a request at one time by the  
15 Bulls to do 41 games.

16 Q In that agreement, did you collect a tax  
17 from WGN or the Bulls or from anyone for having those  
18 signals -- for having those games go on super station  
19 WGN?

20 A Under the current agreement that is in  
21 effect?

22 Q Yes.

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1 A No.

2 Q You allowed them, WGN, super station WGN,  
3 to show these games as a super station without  
4 requiring any additional payment?

5 A No, I didn't say that.

6 Q Well, they paid you for the rights, is  
7 that correct?

8 WGN wrote you a check for a certain amount  
9 of money to take these games and show them on their  
10 super station.

11 A That's not the nature of the transaction.

12 Q What is the nature of the transaction?

13 MS. BEHAN: Again, I'm going to object to  
14 the extent that he's calling for a conclusion about  
15 what happened in the litigation. To the extent you  
16 know what the arrangement is today, you can understand  
17 it.

18 CHAIRMAN GRIFFITH: I think what he's  
19 asking about now is what's the transaction that he was  
20 involved in dealing with this particular station, the  
21 super station.

22 Can you answer that question?

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1 THE WITNESS: I can generally describe --

2 CHAIRMAN GRIFFITH: All right, please.

3 THE WITNESS: -- the transaction.

4 The NBA is receiving some consideration  
5 for its grant of the rights to WGN to distribute game  
6 -- NBA games involving the Bulls outside of Chicago.

7 BY MR. SEIVER:

8 Q That's due to its super station tax, is  
9 that right?

10 A It's due to their -- to the distribution  
11 of that signal on a national basis, yes.

12 Q And you reached this agreement with the  
13 Bulls and WGN in an arms length transaction?

14 A Yes.

15 Q Now you also sell NBA games not just to  
16 super stations, but to networks and cable networks;  
17 and I think you also testified directly, is that  
18 right, to DBS subscribers in packages?

19 A Well, I didn't say that the NBA sold them  
20 directly to DBS subscribers.

21 Q Well, I'm just trying to get an idea now  
22 of what the market is for you to sell your games --

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1 you at the NBA.

2 And I guess the first one was going to be  
3 the broadcast networks: ABC, NBC, CBS, and Fox. Is  
4 that right?

5 A They are broadcast networks.

6 Q Those are the four broadcast networks that  
7 we have that you sell?

8 A We don't sell to all of those networks.

9 Q Oh, I'm sorry. But they are out there  
10 bidding for sports rights generally?

11 A Yes.

12 Q And there's also -- there's nothing that's  
13 legally prohibiting you from selling to more than one  
14 of these networks, is there?

15 A Only the terms of our agreement with NBC.

16 Q But if CBS stepped up to the plate with  
17 more money than NBC, you'd say bye-bye NBC, here's CBS  
18 -- here's the agreement?

19 A Not during the term of the agreement.

20 (Laughter.)

21 Q Absolutely.

22 No, when that agreement is up for renewal.

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1 I mean, that's how Fox got NFL away from CBS, isn't  
2 it; or was it during the contract when it was renewal  
3 time?

4 A Yes.

5 Q They outbid for renewal rights? Okay.

6 And you also have the super stations that  
7 we've listed, and I'm not going to list them all, but  
8 I believe -- did you say there's seven super stations?

9 I'm not trying to trick you. I'm just --

10 A There are a number.

11 Q One, two, three, four, five, six, seven,  
12 right?

13 A I think there may be another one or two,  
14 but they may only be on C-band, but I'm not --

15 Q And other independent stations -- for  
16 instance, channel 20 and channel 45 buy sports rights  
17 as well?

18 A You're referring to the stations in the  
19 Washington market?

20 Q Yes, the Washington market, yes.

21 A I'm familiar that in the past, channel 20  
22 has. And I'm not that familiar with the current

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1 arrangements that the teams have.

2 Q I just called those -- okay.

3 Then we also have the cable networks like  
4 the ESPN's, the TNT's, and those, right, that come up  
5 when it's contract time and -- or bidding time and  
6 will give you money so that they would get the rights?

7 A That's in another category of rights.

8 Q And then you also have this -- and I'm not  
9 sure how to describe it. Should I just call it  
10 direct? I mean, the NBA League Pass package that you  
11 sell to DBS; how would you characterize that? It's  
12 not to any one of these. It's a direct package.

13 What should I call it?

14 A You can call it DBS and DTH.

15 Q DBS, DTH, direct.

16 And you freely sell -- a league pass is a  
17 package of about 1,000 games?

18 A Yes.

19 Q It's about \$150?

20 A Yes.

21 Q During the NBA season?

22 A Yes.

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1 Q How long is the NBA season, six months?

2 A Roughly six months.

3 Q Six months. So if you work it down, it's  
4 \$150 over six month; is it \$20-some dollars a month?

5 A That would be \$25.

6 Q \$25, I'm sorry. And there are other  
7 packages sports programming that are sold in DTH like  
8 Major League Baseball has a package?

9 A Yes.

10 Q NCA, football?

11 A ESPN offers an NCA football package.

12 Q NCA basketball?

13 A Yes.

14 Q NHL -- is it Center Ice?

15 A Yes.

16 Q NFL's Sunday ticket?

17 A Yes.

18 Q And you sell to them while at the same  
19 time selling to the other entities up here, is that  
20 correct?

21 A We carefully apportion various rights to  
22 various of those entities in a manner that we believe

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1 to be in our best economic interest.

2 Q Well, if I want to watch a game and I  
3 bought your \$150 NBA League Pass, are any of those  
4 games available on any of the other four sets of  
5 rights holders?

6 A Depending upon where you are, where --  
7 what particular technology you are using, those games  
8 may be available in another medium. As I testified to  
9 this morning, the DBS package features black outs and  
10 the like in order to protect local distribution.

11 So it is not likely that you're going to  
12 find games in multiple technologies at a given time,  
13 but for some of the games that are on the cable  
14 package.

15 Q Now when you sell to any of these entities  
16 -- that's you as the NBA, and you sit down at the  
17 table, it's an arms length market transaction, am I  
18 right?

19 A We don't directly sell to all of those  
20 entities. We don't generally make sales to the  
21 independent stations. And depending upon the  
22 particular super station, we may or may not make an

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1 arrangement directly with the super station.

2 Q But at least with WGN, there was some sort  
3 of an arrangement?

4 A There is currently an arrangement.

5 Q With some consideration, whether it be a  
6 tax or whatever, some consideration where you allowed  
7 them to carry the 12 games a season?

8 A Yes.

9 Q Are any of those 12 games available, to  
10 your knowledge, on any other source over the year or  
11 by cable or by satellite?

12 A I believe that those games would generally  
13 be available in the other team's home market.

14 Q And you also sell to WTBS in addition to  
15 WGN, is that right?

16 A Yes.

17 Q Just so you can see it, there's WTBS and  
18 you've got a little NBA logo. And those are the Hawks  
19 games?

20 A No.

21 Q What games are those?

22 A That's a package of NBA games.

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1 Q And do you get a super station tax from  
2 WTBS for the rights to broadcast those games?

3 A We negotiate an arms length agreement  
4 covering the dissemination of those games.

5 Q Does the term of that agreement include  
6 the number of persons or subscribers that receive that  
7 particular channel of programming?

8 A What do you mean by that?

9 Q Well, later on in your testimony, I think  
10 you talk about somebody can turn on the Bulls game --  
11 I'm sorry, turn on WTBS and four and a half million  
12 people get to watch a particular game, I believe you  
13 said. And what I wanted to make sure is that -- oh,  
14 yes.

15 Page 31, middle paragraph. If you want to  
16 just read it so it's clear.

17 "The NBA has also licensed Turner  
18 Broadcasting during the 1996 and '97 season the rights  
19 to televise over super station WTBS 25 regular season  
20 games and any post season games not televised by NBC  
21 or TNT."

22 Let me stop right there. That's -- you

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1 actually made a deal with them that preserved your  
2 exclusivity, is that right; so that if the games are  
3 going to be shown by NBC or TNT, two other networks,  
4 then TBS can't show them, is that right?

5 A That's correct.

6 Q Okay. I just want to make sure.  
7 Exclusivity is there. And then you say more than 4.5  
8 million HSD and DBS households will receive the WTBS  
9 telecast from satellite carriers pursuant to Section  
10 119.

11 So when you were writing this testimony,  
12 you just made reference to the 4.5 million home  
13 satellite dish and DBS households -- or broadcast  
14 households that get WTBS, is that right?

15 A Yes.

16 Q Was your tax or was your consideration  
17 that you charged -- well, the Atlanta market is not  
18 that big, as I presume. That's not 4.5 million  
19 people. It was just -- without a super station, there  
20 wouldn't be four and a half million people watching,  
21 is that right?

22 A I'm not sure what the size of the Atlanta

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1 market is. I'm sure there are not four and a half  
2 million DTH homes in Atlanta.

3 Q Was the consideration based -- was the  
4 consideration that you got from TBS based on the 4.5  
5 million HSD and DBS homes?

6 A It was based upon their ability to  
7 distribute the signal to all of the homes that receive  
8 WTBS, whether they be satellite homes, cable homes, or  
9 off air homes in the Atlanta market.

10 Q Did you say cable homes?

11 A Yes.

12 Q How many cable homes get WTBS?

13 A Roughly 60 million.

14 Q Sixty million homes get WTBS.

15 Do cable operators pay you an arms length  
16 -- across the table for the right to broadcast WTBS  
17 into their subscriber's homes?

18 A No, they don't.

19 Q What do cable operators pay you?

20 A Cable operators have a similar compulsory  
21 license that relates to the distribution of WTBS.

22 Q And it's paid into a fund that's actually

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1       probably in this building somewhere, is that right?

2           A       I haven't wandered the halls that  
3       substantially, so I can't say where it is exactly.

4           Q       And would you agree that you, as the NBA,  
5       have participated in distributions of that fund?

6           A       Yes.

7           Q       So when you go to make your deal with WTBS  
8       to put these NBA games on the air, WTBS pays you a  
9       certain amount of money; and that money is reflecting  
10      the fact of WTBS's distribution to 60 million homes?

11          A       They purchase national rights. There is  
12      consideration flowing in both directions, and there is  
13      the understanding that -- by both parties that the NBA  
14      will go to the Copyright Office and register a claim  
15      for copyright fees.

16          Q       So the markets kind of take into  
17      consideration compulsory license fees and fees from  
18      TBS to make sure you're whole?

19          A       In that particular case, it has been part  
20      of an arms length transaction as it relates to the  
21      rights fee portion. The other portion is subject to  
22      hearings such as these to determine the precise amount

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1 that we ultimately receive.

2 Q Well, you were familiar with the cable  
3 copyright license. I believe you referred to it as  
4 Section 111. That's been in effect since 1976?

5 A It has been in effect I think since that  
6 date.

7 Q And it's been pretty constant?

8 A Well, there have been some changes to it,  
9 but I would have to refer to other members in the room  
10 to tell you about it in any more detail.

11 Q And then we have the Satellite Home Viewer  
12 Act or SHVA, as we call it; and that was passed in  
13 1988, am I right?

14 A Yes.

15 Q And I think you testified that when SHVA  
16 was passed, a royalty rate was established of 12 cents  
17 for super stations -- I'll call them SS -- and three  
18 cents for network stations, am I right?

19 A Yes.

20 Q And this was in the statute. This is  
21 Congress.

22 Do you know, do they just make these

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1 numbers up?

2 A I'm not precisely sure where those numbers  
3 came from.

4 Q You have no information whether or not  
5 these numbers were intended to reflect the approximate  
6 level of cable royalties per subscriber?

7 A I don't recall exactly how those numbers  
8 were derived.

9 Q Do you know what the -- in 1988, were you  
10 still doing your contracts? You started in '82, is  
11 that right? Were you still doing your contracts with  
12 stations in 1988?

13 A I don't understand the question.

14 Q Well, in 1988, there were super stations,  
15 am I right, that at least went to cable?

16 A Yes.

17 Q And did you know in 1988, just like you do  
18 today, that a certain amount of money was being paid  
19 by cable operators into a fund and you were going to  
20 come in and register your claim to it and get that  
21 ultimately -- that is in 1988. I should -- let me  
22 write 1988.

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1                   We're talking about SHVA on the chart.  
2                   I'm talking about cable now.

3                   A       Did I know in 1988 that there were super  
4                   stations and that we would make a claim?

5                   Q       Yes, for cable royalties paid for carriage  
6                   of those super stations.

7                   A       Well, there certainly was a compulsory  
8                   license in 1988. And to the best of my recollection,  
9                   we did make a claim. I don't remember a lot of the  
10                  details.

11                  Q       In 1988, would it be fair to say both WTBS  
12                  and WGN were carrying sports programming?

13                  A       Certainly WTBS. I don't recall whether  
14                  WGN at that time was carrying NBA programming, but  
15                  they were carrying baseball programming.

16                  Q       Now you also testified that in 1992 there  
17                  was a similar panel that convened to set rates. Do  
18                  you remember what those rates were that came out of  
19                  the '92 arbitration?

20                  A       Yes.

21                  Q       Okay, can you tell me what those were?

22                  A       They were six cents --

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1 Q For the networks?

2 A -- for the networks; 17½ cents for the  
3 super stations; and 14 cents for the syndex proof  
4 super stations.

5 Q I'll put SP. And you explained a little  
6 bit about what syndex proof means earlier I think with  
7 Ms. Behan such that if a station that is not syndex  
8 proof -- and let's take an example of WW -- I mean  
9 WSBK that's not syndex proof goes into a market, there  
10 is a surcharge of that 3½ cents to reflect the fact  
11 that there's a loss of control over exclusivity, is  
12 that right?

13 A I'm not sure that it's a surcharge per se,  
14 but there's a higher rate that's charged for that  
15 signal.

16 Q Very careful answer. Thank you.

17 So at least as far as the panel in 1992  
18 was concerned, they were trying to address some of  
19 your market value concerns with the loss of  
20 exclusivity, is that right, in distinguishing between  
21 the two rates for the two super stations?

22 A I think there was a recognition that there

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1 was a difference.

2 Q You testified in that proceeding, didn't  
3 you, in 1992 -- what led up to the 1992 rates?

4 A Yes.

5 Q And you urged the panel to adopt a higher  
6 rate than the 12 cents and the three cents that were  
7 currently in effect, didn't you?

8 A Absolutely.

9 Q There was a chart earlier, and I wanted to  
10 ask you about that. We have the 1997 rate adjustment.  
11 This wasn't the one that was applicable back then,  
12 right; it was a different one?

13 MR. SEIVER: Ms. Behan, is that chart  
14 available?

15 MS. BEHAN: What are you talking about?

16 MR. SEIVER: You remember the '88 SHVA  
17 that had the different standard. I thought you put  
18 them both up.

19 MS. BEHAN: I did not put them both up  
20 during his direct testimony.

21 MR. SEIVER: You didn't?

22 MS. BEHAN: No.

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1 MR. SEIVER: You didn't go over it with  
2 John?

3 MS. BEHAN: No, I didn't go at all in that  
4 testimony.

5 MR. SEIVER: You didn't? I remember it  
6 showed the fair return to the copyright owner, had all  
7 that language. I remember seeing it.

8 MS. BEHAN: It was during the opening  
9 statement.

10 CHAIRMAN GRIFFITH: Opening statement,  
11 yes.

12 MR. SEIVER: So is that chart available?  
13 I ask you if I may use it.

14 MS. BEHAN: Can I use your charts too?

15 MR. SEIVER: Any time. And I don't charge  
16 a fee.

17 BY MR. SEIVER:

18 Q Mr. Desser, 1988's SHVA, as we call it,  
19 directed the arbitration panel to consider -- I guess  
20 it's the approximate average cost to a cable system or  
21 the right to secondarily transmit and then fee based  
22 on the other objectives.

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1 Do you remember, was it your understanding  
2 that when that fee was set, you claimed it was less  
3 than market; I think it was 14, 17½. Was it something  
4 that approximated the cable -- average cost to a cable  
5 system for the right to secondarily transmit the  
6 signals, do you remember?

7 A I don't recall.

8 Q Do you remember urging a fair market value  
9 approach at that time based on the -- affording the  
10 copyright owner a fair return for his or her creative  
11 work?

12 MS. BEHAN: Object.

13 Do you mean he personally?

14 MR. SEIVER: Yes, he personally during the  
15 course of the proceedings.

16 MS. BEHAN: In the course of his  
17 testimony?

18 BY MR. SEIVER:

19 Q Do you remember urging that? Do you  
20 remember urging that in your testimony?

21 A I don't specifically remember, but I don't  
22 doubt that I did.

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1 (Laughter.)

2 Q I think if I do this enough times, maybe  
3 -- all right, let's look at this.

4 Mr. Desser, this is Exhibit 5-X. Is this  
5 not your testimony that was presented in the prior  
6 satellite carrier rate adjustment proceeding?

7 (Whereupon, the above-  
8 referenced document was marked  
9 as SBCA Exhibit 5-X for  
10 identification.)

11 A It purports to be.

12 MS. BEHAN: Your Honor, is that --

13 MR. SEIVER: Purports?

14 MS. BEHAN: I would note for the record  
15 this has been incorporated by reference already into  
16 the --

17 CHAIRMAN GRIFFITH: Okay.

18 MS. BEHAN: And I would also ask that Mr.  
19 Desser be permitted to take a minute since this was  
20 many years ago that he testified.

21 MR. SEIVER: Of course.

22 MS. BEHAN: Look over the testimony so you

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1 know exactly what it was you urged or didn't urge.

2 MR. SEIVER: While you're looking at that,  
3 Mr. Desser, I want to hand out what's going to be my  
4 next exhibit just so we can move things along.

5 It is an excerpt of your direct and cross  
6 examination from the 1992 proceeding of the satellite  
7 carrier rate adjustment, Exhibit 6-X.

8 Have you had a chance to look that over,  
9 Mr. Desser?

10 (Whereupon, the above-  
11 referenced document was marked  
12 as SBCA Exhibit 6-X for  
13 identification.)

14 THE WITNESS: I have not completed my  
15 review of it.

16 MR. SEIVER: Take your time.

17 MS. BEHAN: Your Honor, I'd also note that  
18 6-X has been incorporated by reference too.

19 CHAIRMAN GRIFFITH: All right, thank you.

20 MR. SEIVER: Excuse me, Your Honor. Maybe  
21 it would be easier if we took a break now and Mr.  
22 Desser is going to read testimony.

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1 My question's on page four of that and  
2 also on page 219 of the -- did I give you a copy of  
3 your prior -- the cross examination?

4 THE WITNESS: No.

5 CHAIRMAN GRIFFITH: You're suggesting we  
6 take our afternoon recess?

7 MR. SEIVER: If that would speed things  
8 up.

9 CHAIRMAN GRIFFITH: That's fine with me,  
10 except how long do you anticipate you're going to go?  
11 I don't want to take a recess now and another one at  
12 7:00.

13 (Laughter.)

14 MR. SEIVER: I still have some more. I  
15 don't know. I'm hoping that it will go a little bit  
16 faster.

17 CHAIRMAN GRIFFITH: Are you almost  
18 finished, or do you need more time?

19 MR. SEIVER: Well, I haven't -- I've got  
20 another page and a half of notes.

21 CHAIRMAN GRIFFITH: Well, let's just take  
22 a five minute recess at this point and give him an

1 opportunity to go through it.

2 MR. SEIVER: Thank you.

3 THE WITNESS: I'll read as quickly as I  
4 can.

5 (Whereupon, the foregoing matter went off  
6 the record at 2:55 p.m. and went back on  
7 the record at 3:13 p.m.)

8 CHAIRMAN GRIFFITH: All right. Go ahead,  
9 please.

10 MR. SEIVER: Thank you very much, Your  
11 Honor.

12 BY MR. SEIVER:

13 Q Mr. Desser, I want to just back up so we  
14 can get this in context, since we had a little bit of  
15 a break. I've put up here the Satellite Home Viewer  
16 Act from '88 and '94. I want to compare the language,  
17 because you did talk about the language that is  
18 applicable to the valuation process in this  
19 proceeding. In the prior proceeding, it was the one  
20 that you testified in -- it was the 1988 Act, is that  
21 correct?

22 A In the '92 hearing.

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1 Q The prior hearing, yes.

2 A Yes.

3 Q And I asked you about whether the panel --  
4 it says, "Shall consider the approximate average cost  
5 to a cable system for the right to secondarily  
6 transmit to the public a primary transmission made by  
7 a broadcast station." That is what they were supposed  
8 to consider, is that right?

9 A There were a variety of things to  
10 consider.

11 Q "And the fee also calculated to achieve  
12 the following objectives -- to maximize the  
13 availability of creative works to the public, for the  
14 copyright owner a fair return, reflect the relative  
15 roles, and minimize disruption." I mean, we have  
16 this. This is a legal issue. It's in the case. I'm  
17 not trying to mislead you.

18 In your testimony -- I direct your  
19 attention to page 219 -- I had asked you about how you  
20 testified in the prior proceeding.

21 MR. SEIVER: And again, I am at a loss as  
22 to what exhibit number it is, Your Honor.

1 CHAIRMAN GRIFFITH: Exhibit 6.

2 MR. SEIVER: Thank you.

3 BY MR. SEIVER:

4 Q Page 219, line 10, there's a question from  
5 Mr. Glist, okay, and then I will ask the next  
6 question. "Can you show me in the portion that you  
7 reviewed where the statute calls for a comparison with  
8 regional sports services rather than with broadcast  
9 signals?" I'm not interested in that particular part  
10 of the question. I wanted you to read your answer.

11 "I believe the statute talks about fair  
12 pricing, fair returns for the owner of the copyright,  
13 and a fair income. And in that context, we seek to  
14 demonstrate that in the free market, without any  
15 regulation, without anyone compelling us to license at  
16 a particular rate, the games are being sold for DBS  
17 purposes at 15 cents per game." That's what I want to  
18 ask you about.

19 And do you recall that was your testimony?  
20 There's no reason to believe this wasn't your  
21 testimony in 1992, is there?

22 A I don't have specific recollection, but --

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1 MR. SEIVER: Could we have that in a  
2 stipulation from --

3 JUDGE GULIN: It's incorporated already.

4 MS. BEHAN: It's been incorporated.

5 MR. SEIVER: But I have a correct copy.  
6 I read it correctly.

7 MS. BEHAN: Yes. I just want to state for  
8 the record that we haven't offered Mr. Dessser as a  
9 legal expert as to the interpretation of that statute.  
10 All we did was ask him for his understanding of the  
11 current standard and the statute.

12 To the extent he is asking for a legal  
13 interpretation of what Congress meant, a matter of  
14 statutory interpretation or legislative intent, I  
15 think that gets into the area of legal analysis. But  
16 to the extent that he asks about, you know, what his  
17 understanding or what, you know -- what he would  
18 interpret those words to mean from his own  
19 perspective, I don't have any problem with that.

20 CHAIRMAN GRIFFITH: The objection is  
21 premature at this time.

22 MS. BEHAN: Okay.

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1 CHAIRMAN GRIFFITH: Go ahead.

2 BY MR. SEIVER:

3 Q Mr. Desser, what you were asking for in  
4 that testimony, as I read it, is that you wanted to be  
5 able to license at a particular rate that games are  
6 being sold for DBS purposes at 15 cents per sub per  
7 game. Now, we talked about who you licensed sports  
8 to, and you don't license your sports programming to  
9 anybody at a compulsory rate, do you?

10 A I had a problem with that -- what appeared  
11 to be a compound question. The first part of that you  
12 understood that I was suggesting that we were asking  
13 for a 15 cent per sub per game rate?

14 Q I'm going to ignore that. I'm asking  
15 about the sentence that I just read. "We seek to  
16 demonstrate that in a free market, without any  
17 regulation, without anyone compelling us to license at  
18 a particular rate," I want to understand when you were  
19 saying that, did you feel that you were compelled to  
20 license any of the entities that we had listed here at  
21 a particular rate? I want to understand what you were  
22 talking about. Any of these entities, are you

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1 compelled to license them at a particular rate?

2 MS. BEHAN: Object to the question. It  
3 was vague.

4 MR. SEIVER: I'm just repeating --

5 CHAIRMAN GRIFFITH: What basis?

6 MS. BEHAN: It was vague. I don't  
7 understand it. I'm not sure he does. If he  
8 understands it --

9 CHAIRMAN GRIFFITH: Are you able to answer  
10 the question, sir?

11 THE WITNESS: It's a confusing question.

12 CHAIRMAN GRIFFITH: Do you want to  
13 rephrase the question?

14 MR. SEIVER: I will do my best, Your  
15 Honor.

16 CHAIRMAN GRIFFITH: Thank you.

17 BY MR. SEIVER:

18 Q We went through a while ago that you  
19 licensed sports rights to these entities at varying  
20 rates, whatever, arms-length transactions. Am I  
21 right?

22 A To some of those entities.

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1           Q       To some of these entities. You were  
2 complaining in the prior proceeding, under the old  
3 Satellite Home Viewer Act, that you were saying you  
4 don't want to be compelled to license at a particular  
5 rate. I wanted to ask you: what did you mean by  
6 being compelled to license at a particular rate?

7           A       That refers to the Section 119 rates that  
8 were in effect over the past several years.

9           Q       Are the Section 119 rates designed to  
10 value sports rights?

11          A       They are designed to value all rights.

12          Q       The right to secondarily transmit to the  
13 public a primary transmission? Do you know if that  
14 was what the valuation obligation was?

15          A       It was the valuation as it relates to the  
16 distribution by the carriers covered by 119 of all of  
17 the programming on those signals.

18          Q       Not just sports?

19          A       Not just sports.

20          Q       There is a certain distribution of a  
21 signal. You're not licensing sports rights for six  
22 cents or 14 cents or 17-1/2 cents yourself. You're

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1 licensing your rights to the stations that make the  
2 primary transmission. Isn't that right?

3 A No. We're doing that, but that's not what  
4 this testimony refers to.

5 Q Oh. Well, can you tell me what it  
6 referred to?

7 A Certainly. This refers to the rates that  
8 we charge, and continue to charge, for delivery of  
9 regional sports network carriage of NBA games to home  
10 satellite dish owners.

11 Q And those rates are at a compulsory rate?

12 A No.

13 Q Oh, oh. You don't have any problem with  
14 those rates?

15 A No.

16 Q That's your league pass and all of the  
17 other specialty --

18 A That is not the league pass, no. But that  
19 is an example of an arms-length transaction that we  
20 were comparing the statutory rates to. We're saying  
21 that when we do an arms-length deal, we can sell the  
22 rights to just one game for 15 cents a sub, let alone

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1 15 cents for a whole month's worth of games and other  
2 programs.

3 Q But you're not selling your rights for 15  
4 cents or 14 cents or six cents or anything. The  
5 compulsory license rate is paid for the signal, not  
6 for your sports rights, is it?

7 MS. BEHAN: Your Honor, I'm going to  
8 object. The witness has explained that he is talking  
9 about with a 15 cents of free market rate, and Mr.  
10 Seiver continues to try to confuse that with the  
11 compulsory rate. His testimony is not about the  
12 compulsory rate. It's about the free market rate for  
13 regional sports services. That's what he has just  
14 testified to.

15 CHAIRMAN GRIFFITH: The objection is  
16 overruled.

17 Go ahead.

18 MR. SEIVER: If I only could remember it  
19 exactly the way I read it. Can you try it?

20 (Whereupon, the previous question was  
21 played back by the Court Reporter.)

22 BY MR. SEIVER:

1 Q Do you understand the question, Mr.  
2 Desser?

3 A I believe I understand the question. I'm  
4 not sure I am qualified to answer as it relates to the  
5 difference between the signal and the copyrighted  
6 program thing that is, you know, embedded in the  
7 signal.

8 Q Let me try to make it a lot easier, since  
9 I'm not sure that question was as clear as I  
10 remembered it.

11 (Laughter.)

12 MS. BEHAN: I often have the same problem.

13 MR. SEIVER: You didn't have to chime in.

14 BY MR. SEIVER:

15 Q Mr. Desser, I want you to look at the 1997  
16 arbitration panel's standard for determining  
17 valuation. What are we doing in this proceeding is my  
18 question, rhetorically. And I'm asking you to look at  
19 this particular statute, and this part that was  
20 brought up and talked about during your opening, or  
21 during your direct.

22 "The panel shall establish fees for the

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1 retransmission of network stations and superstations  
2 that most clearly represent the fair market value of  
3 secondary transmission." We're valuing secondary  
4 transmissions in this proceeding, not sports rights.  
5 Am I right?

6 A My understanding is that we're valuing the  
7 value that is obtained embedded -- embodied in those  
8 signals.

9 Q Okay. Do you know what a secondary  
10 transmission is?

11 A It would be something after a primary  
12 transmission.

13 (Laughter.)

14 Q Do you know what a primary transmission  
15 is?

16 A I don't know what the FCC definition is.

17 Q What is your understanding?

18 A I would think that that relates to a  
19 transmission by, say, a broadcaster of programming  
20 that it originates.

21 Q To the public, over the air?

22 A It could. It may include more than that.

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1           Q       So what they want to know is the fair  
2 market value, or the obligation in this proceeding,  
3 the secondary transmission of that primary  
4 transmission. Now, when you come in here and you've  
5 asked for the current rate for what we're having --  
6 the six, 14, and 17-1/2 is the rate for the secondary  
7 transmission, am I right? The compulsory license rate  
8 for secondary transmissions that are currently paid  
9 satellite carriers?

10           MS. BEHAN: I'll raise the same objection.  
11 What I think he is asking for is a statutory  
12 interpretation question as opposed to --

13           MR. SEIVER: I'm asking his  
14 interpretation, his understanding.

15           MS. BEHAN: -- his understanding of what  
16 the statute is, which he has testified to.

17           JUDGE COOLEY: Asking for his  
18 understanding?

19           MR. SEIVER: Yes.

20           CHAIRMAN GRIFFITH: The objection is  
21 overruled.

22           Go ahead.

1 THE WITNESS: My understanding is that  
2 we're talking here about the value to the carriers of  
3 the ability to sell that transmission.

4 BY MR. SEIVER:

5 Q The value to the satellite carriers is  
6 what you're focusing on, not the value to the owners,  
7 the sellers of the secondary transmission, just to the  
8 buyers of the secondary transmission?

9 A Well, you know, valuation is based upon  
10 both sides of that transaction.

11 Q So that's fair market value is the willing  
12 buyer/willing seller?

13 A Yes.

14 Q And the willing buyer here is the  
15 satellite carrier, and the willing seller is the owner  
16 of the primary transmission, isn't it?

17 A I believe it is of the copyrighted  
18 programming. This is a copyright hearing, I thought.

19 Q Well, it says secondary transmission, and  
20 I guess I am confused as to what your testimony really  
21 is. But let me take it from what you've said. For  
22 whatever reason, the owners of the primary

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1 transmission pay copyright owners, such as yourself,  
2 fees for the right to primarily transmit sports  
3 programming. Is that right?

4 A Yes.

5 Q And that transaction is at a fair market  
6 value, is that right?

7 A Yes. When you sell, generally.

8 Q When you sell to an ABC, NBC, CBS, or FOX,  
9 people who make primary transmissions, that's at a  
10 fair market value?

11 A Yes.

12 Q So in that willing buyer/willing seller  
13 relationship, you're sitting down at a table and  
14 you're getting value from those particular entities  
15 who obviously say there is some value to us from  
16 having that programming. Is that right?

17 A Yes.

18 Q Now, when the owners of the primary  
19 transmission -- for example, the broadcasters -- put  
20 their signal out, whether it's a broadcast network  
21 affiliate or a superstation, do they charge  
22 subscribers for the right to receive that signal?

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1 A They may indirectly.

2 Q And how is that?

3 A Well, in the context of retransmission  
4 consent, that may be going on.

5 Q Well, I guess this could take another hour  
6 if we get into that.

7 I didn't mean the cable operators. I'm  
8 talking about the people who were receiving the signal  
9 and watching it on their television. Are they paying  
10 a fee to the owner of the primary transmission for the  
11 right to watch that transmission?

12 A I don't believe so.

13 Q So for whatever reason, these broadcasters  
14 -- the networks and superstations -- and we went  
15 through that exhibit of them throwing billions of  
16 dollars, hundreds of millions of dollars rather, for  
17 the rights -- somehow or other have made an economic  
18 case for themselves that allows them to put that  
19 signal out to the public.

20 A That's their business. They sell  
21 advertising.

22 Q Thank you.

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1                   That's a very lucrative business for the  
2 broadcasters, isn't it?

3                   A       It can be.

4                   Q       Do you know what sports sell for on  
5 superstations and network stations during your premier  
6 sports events?

7                   A       Not specifically.

8                   Q       Hundreds of thousands of dollars a minute?  
9 \$100,000?

10                  A       On a network basis, could certainly be  
11 hundreds of thousands.

12                  Q       Are you still responsible for making the  
13 NBA's deals with the networks and the superstations  
14 that we listed?

15                  A       Yes.

16                  Q       And that's not a relevant act, in your  
17 mind, to know how much money the primary transmitter  
18 is making in determining what you should charge them  
19 for the rights to show your sports programming?

20                  A       Of course it's a factor.

21                  Q       But you just don't know right now, sitting  
22 here, what those numbers are?

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1           A       You asked a very broad question.

2           Q       Very well.

3                   And we talked about earlier -- I was  
4       trying to get you to estimate the amount of  
5       broadcasters' ad revenues, and I think we discussed it  
6       was in the 8- or \$9 billion range for their revenues.  
7       Was that right?

8           A       You suggested that number.

9           Q       And would it be fair to say that when the  
10       broadcasters are making their decisions across the  
11       table from you, that they know that they can throw a  
12       certain amount of money in the pot, or whatever other  
13       consideration, based on their ability to get  
14       advertising revenue from the people that watch their  
15       signal?

16                   MR. OSSOLA: Your Honor, I'm Chuck Ossola  
17       for the commercial networks. I don't think I can  
18       stand to have Mr. Seiver call me Charles Ossola, so --

19                   (Laughter.)

20                   He is asking an NBA witness to talk about  
21       what is in the minds of a network during negotiations.  
22       That's not a proper question.

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1 MR. SEIVER: I'll withdraw it.

2 CHAIRMAN GRIFFITH: Yes. Thank you.

3 MR. SEIVER: Thank you, Chuck.

4 MR. OSSOLA: Any time.

5 BY MR. SEIVER:

6 Q Suffice it to say, then, the owners of the  
7 primary transmissions make their deals for whatever  
8 reasons they have in their mind of paying money to  
9 you, and you have in your mind whatever is relevant to  
10 you at the particular moment as to what to charge  
11 them. And there is active bidding, am I right, by the  
12 various networks and others for the rights, for the  
13 sports rights?

14 A Sometimes.

15 Q Now, those sports rights are being sold  
16 for that primary transmission. Is that correct?

17 A Sometimes.

18 Q That's because we talked about, with WGN,  
19 there was this national tax that when WGN, which goes  
20 beyond the Chicago area because it's a superstation,  
21 pays something additional in order to have the right  
22 to show the game. Is that right?

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1           A       They never paid a tax, if that's what  
2       you're asking.

3           Q       Do you remember when we talked about WTBS,  
4       that you said the number of subscribers that watched  
5       WTBS you said factored into your licensing calculation  
6       for them, and they took their 25 game package, right?

7           A       The total distribution of WTBS has an  
8       impact on what it is that WTBS can afford to pay.  
9       However, it is the variety of networks in the  
10      marketplace making those sorts of calculations that  
11      determines what the marketplace rate is for that  
12      particular programming.

13          Q       Now, WTBS and WGN do not sell their signal  
14      directly to their viewers, is that right? We've  
15      established that?

16          A       They distribute them through third parties  
17      to -- ultimately, to viewers.

18          Q       Who pay those third parties?

19          A       The subscribers pay the party that  
20      delivers the signal to them, and those parties pay the  
21      people who distribute the signal to them. And there  
22      is a chain.

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1 Q And everybody is happy when it's hundreds  
2 of millions of dollars, we have high salaries, and  
3 everybody gets to watch all of the games?

4 A I'm not sure that necessarily everyone is  
5 happy when there is a compulsory license involved.  
6 Even if there are millions of dollars in one respect,  
7 if there is something undermining the market in the  
8 other respect, it has a disruptive influence on that  
9 marketplace.

10 Q Well, we're going to be getting repetitive  
11 if I continue that. I don't want to argue with you  
12 about that. But that issue I do want to come back to.  
13 I want to make sure we get finished today, so I'm  
14 going to switch gears just slightly.

15 Mr. Desser, in your testimony, you had  
16 discussed with Ms. Behan items in Table 3. I'd like  
17 you to turn your attention to that right now.

18 MS. BEHAN: 16.

19 MR. SEIVER: Page 16. I'm sorry.

20 BY MR. SEIVER:

21 Q And it shows here the different  
22 superstations that are uplinked by the various

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1 carriers, is that right?

2 A Superstations and network signals, yes.

3 Q Network stations. And you wrote -- and  
4 that last column is supposed to be subscribers, right?

5 A Yes.

6 Q Do you know whether in the distribution of  
7 satellite signals some subscribers have more than one  
8 authorized decoder to receive satellite signals?

9 A It's possible.

10 Q You don't know?

11 A Do I know whether a particular subscriber  
12 has more than one decoder?

13 Q No, I didn't ask you about that.

14 You read the trades. Do you know if there  
15 is a process by which, if someone wants to have  
16 satellite television on more than one set in their  
17 house, they have to buy a second subscription and  
18 decoder?

19 A I'm sorry. I didn't understand the  
20 question.

21 Q Are you aware of that?

22 A It's not -- I don't believe that's

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1 technically correct.

2 Q Well, what's incorrect there?

3 A It depends on whether they want a  
4 different signal on each of the different sets.

5 Q So if you have one decoder box and you  
6 wire it to the second set, both sets have to be  
7 watching the same program?

8 A Yes.

9 Q If you want to watch a different program  
10 on that second set, you have to have another decoder,  
11 right?

12 A Unless you have another source of input  
13 to --

14 Q I'm sorry. A different -- well, another  
15 satellite dish, I guess.

16 A Don't necessarily need another satellite  
17 dish.

18 Q If you want to watch a different satellite  
19 program from that provider, from Direct TV, you have  
20 to have a second decoder on that set, if you want to  
21 watch something different than the first set?

22 A Yes, that's correct.

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1 Q And those have to be bought by the  
2 subscribers, am I right? They're not given away?

3 A In the case of Direct TV, they have to be  
4 purchased. In the case of Primestar, the equipment is  
5 provided.

6 Q Now, do you know if those particular  
7 subscribers, if they are receiving superstations over  
8 both of those decoders, whether or not two fees are  
9 paid for those two decoders?

10 A I don't believe that two fees are paid,  
11 but I cannot be certain of that.

12 Q That would be something relevant to know  
13 if there are multiple sets and multiple fees, as to  
14 what your subscriber count is, right?

15 A Well, I think as I noted, there may be  
16 some double counting as a result of the fact that one  
17 may receive, you know, more than one ABC affiliate,  
18 for example.

19 Q I didn't mean that. That's on one  
20 decoder. I'm talking about second sets with second  
21 decoders in the same household, where they are paying  
22 two fees, for example, for WGN. They would get

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1 counted as two subscribers?

2 A I don't know whether that's true or not.

3 Q Okay. That's fair. You don't know.

4 Look at the next page, Table 4. I thought  
5 this is where you were talking about the double  
6 counting. Here you give, as a comparison between '91  
7 and '92, the various subcounts. I was a little  
8 concerned that -- do you know what the size of the  
9 home satellite dish market was -- subscriber count --  
10 in 1991, total number of people that had dishes?

11 A I don't remember the precise number, no.

12 Q I thought that you might have had an  
13 exhibit on that, but it surely wasn't 3.875 million,  
14 was it?

15 A No, I don't think so.

16 Q That number really is kind of a  
17 meaningless number. It's not the total number of  
18 households that were getting those signals, was it?  
19 You didn't mean that, did you?

20 A That is the total number of separate  
21 signal households, counting WTBS once per household,  
22 and in this particular case counting each of the --

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1 assuming you had a package of network signals that  
2 there were four networks in, you would be counting  
3 that four times.

4 Q So if I got one of those -- I think you  
5 were looking at Superview that had all of the  
6 superstations in it, and the network stations, I'm  
7 just one person but I might be counted -- 1, 2, 3, 4,  
8 5, 6, 7, 8, 9, 10, 11 -- 12 times, if I had all of  
9 that?

10 A Yes, that's true.

11 Q So that 3.8 million is a meaningless  
12 number, then?

13 A No, it's not meaningless.

14 Q As far as number of subscribers is  
15 concerned, it would be an accident. In fact, it's  
16 very unlikely that it's even close to that.

17 A No, because it's the number of -- it  
18 doesn't purport to be the number of separate dishes.

19 Q When you say "households receiving  
20 signals," that's the title of your table --

21 A Right.

22 Q So you think there is 3.875 million

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1 households that were receiving that? I thought we  
2 just established that one household might be counted  
3 12 times here.

4 A I think we've talked about how this is  
5 being -- how this was calculated, where the numbers  
6 came from. It's pretty clear. But if you want to  
7 quibble, we can quibble.

8 Q I'm not trying to quibble with you. Let's  
9 look at the 1996 numbers. Do you know what the total  
10 subscriber -- the number of dishes that are out there,  
11 high power and c-band dishes are as of 1996?

12 A Roughly.

13 Q And how much is that?

14 A I think it's roughly six million, if  
15 you're -- depends on whether you count the decoders --

16 Q Twice.

17 A No. Whether you count the number of c-  
18 band dishes or the number of c-band decoders. There's  
19 a spread of about a million there.

20 Q Well, let's look at your six or seven  
21 million, whatever it might be.

22 A Okay.

1           Q       Your total for the 1996 column, where you  
2 say households receiving signals, is almost 24  
3 million. Will you agree that that number does not  
4 reflect the number of households that are receiving  
5 those signals?

6           A       I agree that's not the number of separate  
7 households. I believe that what that is is the number  
8 of signals in households.

9           Q       So if one household has 12 signals --

10          A       Then it would show up 12 times in that  
11 particular case.

12          Q       Thank you.

13                   Now, I wanted to ask you also about one of  
14 your exhibits. Let me look first to page 24, Table 7.  
15 And I believe you went through with Ms. Behan -- let  
16 me see if this is one of the charts. I don't think it  
17 is -- ultimately, what the royalty payments were for  
18 the various superstations, and you pulled some retail  
19 prices from Superstar's a la carte packages pricing --  
20 not a la carte packages, but from the a la carte  
21 pricing that accompanies their package pricing. Am I  
22 right?

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1           A       This includes both packages and some a la  
2       carte.

3           Q       I'm sorry. The range established -- I'm  
4       looking at the footnote with three stars by the non-  
5       combo one-month price, which is an a la carte price,  
6       and the combo one-year price, which you say is the  
7       lowest price. And the source is the a la carte list,  
8       so this is not -- that's a combo price added on to a  
9       package, but Superstar sells packages with all of  
10      those included at a single price, don't they?

11          A       All of which included?

12          Q       It sells the superstations, does it not,  
13      at a package price?

14          A       Superstar has a wide variety of packages  
15      at a wide variety of prices.

16          Q       Let's look at it. I think it's -- is it  
17      JSC Exhibit 9? I have it out. Yes, it is Exhibit 9.

18                   CHAIRMAN GRIFFITH: Page 8 and 9 of --

19                   MR. SEIVER: I'm sorry. Exhibit 9, yes,  
20      page --

21                   CHAIRMAN GRIFFITH: Page 8?

22                   MR. SEIVER: Yes, that's right, Your

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1 Honor, page 8 and page 9.

2 BY MR. SEIVER:

3 Q This was the source of your numbers that  
4 you put in the retail price to calculate your retail  
5 per signal price, is that right?

6 A I think that's generally correct.

7 Q Which then generated this chart, which was  
8 their retail price versus their royalty. Am I right?  
9 With this little tiny purple in the royalty, and the  
10 big blue and the other blue showing the range from  
11 bottom to high of the a la carte combo or non-combo  
12 price.

13 Now, we were talking about FOX KDVR  
14 Denver, and you agreed that if you looked back in one  
15 of the packages, for instance, Superstar -- ooh, I'm  
16 sorry. I guess that's not going to work. That's the  
17 Prime Time East package.

18 Let's look at WTBS. On page 2 of your  
19 exhibit, there is a Superview package. Do you see  
20 that, page 2 of JSC 9?

21 A Okay. We're now not talking about --

22 Q We're not talking about the a la carte

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1        combo or non-combo prices.    I'm talking about the  
2        package price for Superview.

3            A        Okay.

4            Q        And do you see the 37 channels that are  
5        there.    It includes WTBS, am I right?    Actually, it  
6        includes    WTBS,    WPIX,    WGN,    and    KTLA    --    four  
7        superstations in there.

8            A        Okay.

9            Q        And what is the combo price, combination  
10       price, package price, for all 37 channels, including  
11       those particular superstations?

12           A        We're leaving out HBO and the other --Q  
13       Yes.    I'm talking about --

14           A        -- movie channels, right?

15           Q        Yes.

16           A        You're referring to the \$17.95 a month?

17           Q        Right.    It wouldn't be fair to look at the  
18       premiums along with the basic networks and the  
19       superstations, as far as price comparison, would it?

20           A        It would depend on what kind of price  
21       comparison you wanted to do.

22           Q        Well, HBO goes for, what, \$10, \$15 a

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1 month? I mean, that's -- by itself is almost as much  
2 as this whole package. But if you have 37 channels at  
3 \$17.95 -- I'll divide it out -- that's about 48 cents  
4 a channel. So if you look at that as the price per  
5 channel, you're somewhere down in here, am I right?

6 A Roughly, yes.

7 Q Okay. Do you have any knowledge as to how  
8 Superstar sells its superstation programming, whether  
9 it's mostly a la carte or mostly in packages?

10 A Well, I think they certainly put out the  
11 a la carte price list, so I have to assume that they  
12 are making some sales on an a la carte basis. They  
13 didn't provide us any sales data when we asked for  
14 that, so I don't know exactly how many they sell of  
15 what.

16 Q Well, I guess I asked the question, so I'm  
17 stuck with that answer.

18 Now, you have talked about this  
19 relationship between the royalty and retail price for  
20 the purpose of telling this panel that you could  
21 increase this royalty, and they've still got a lot of  
22 profit. Is that the point of this particular

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1 comparison?

2 A The point is that there is a considerable  
3 spread. That is correct.

4 Q Is it your testimony that whatever this a  
5 la carte rate is is somehow or other relevant to  
6 setting what the royalty rate should be?

7 A I think it's one of the factors that is  
8 worth considering.

9 Q Do you think there is any relationship at  
10 all on a consistent basis for this panel to base its  
11 decision that the a la carte figure is a certain  
12 multiple of the royalty on a consistent basis?

13 A I note that Superstar publishes a la carte  
14 rates.

15 Q Do you think that they publish the rates  
16 and that's meaningful as far as what the valuation of  
17 this panel's obligation on the license fee should be?

18 A I think it's one many factors for them to  
19 consider.

20 Q Let me ask you about that. We've put out  
21 here what the superstations are. I think your  
22 testimony -- and I'm not going to try and trick you --

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1 but you say TNT's license fee is 52 cents?

2 A It was something in the 50 cent to 60 cent  
3 range. I forget the exact number.

4 Q Looking at the combo sheet, do you see  
5 what TNT goes for as a combo or non-combo signal?

6 A On the a la carte?

7 Q Yes, on the a la carte. Do you see it?

8 A Yes.

9 Q How much is that?

10 A The combo price is \$1.50 a month.

11 Q What's the non-combo price?

12 A \$2.75.

13 Q Wow, that's right up in here. \$2.75 for  
14 a 50-cent payment. That's a pretty big multiple, just  
15 like the multiples that we see here for a  
16 superstation, isn't it?

17 A Well, I think the carriers have a pretty  
18 wide latitude, because they've got royalties of these  
19 rates that they can package the products together and  
20 provide various discounts. And the fact that the  
21 royalty is where it is gives them a wide degree of  
22 latitude in that regard.

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1 Q So they pay TNT, and you think the \$2.75  
2 is a discounted rate?

3 A I didn't say that.

4 Q Well, I was trying to understand that if  
5 they had paid 52 cents to TNT, and they're the -- TNT  
6 is on the other side of the table, they don't have to  
7 sell the license to Superstar, or license Superstar to  
8 sell TNT.

9 They're sitting on the other side of the  
10 table, and they look at them and Superstar says -- I'm  
11 just assuming that they're paying 52 cents. TNT says,  
12 "\$2.75? Gosh, we're going to charge you a buck."  
13 Don't you think that that would have some meaning if,  
14 in fact, a la carte prices were meant to reflect  
15 licensing fees?

16 MR. OSSOLA: Your Honor, I don't know  
17 which of those statements were the question, but I  
18 think that the delivery of testimony by Mr. Seiver  
19 ought to have some reasonable limit.

20 MR. SEIVER: I'll ask the question again.

21 BY MR. SEIVER:

22 Q In fact, what I'm going to do is ask you

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1 some additional questions about the programming  
2 services that are on the a la carte list.

3 Do you see there is a big box that starts  
4 out on page 9 -- on page 8, I'm sorry -- page 8, that  
5 lists the whole number of channels that has a price  
6 for each, and then a combo price of \$2 and \$1.50, as  
7 Arts & Entertainment, Cartoon, CNBC, and all of those?

8 A Yes.

9 Q Do you know what the licensing fees are  
10 for those particular signals?

11 A Not precisely.

12 Q Well, if it's possible, I'm going to want  
13 to ask you to look at an exhibit that does set out  
14 some of those licensing fees.

15 I'd like to have marked as Exhibit 7 a  
16 two-page document that is a Paul Kagan publication  
17 that I believe is discussed -- whose name we've  
18 discussed in this proceeding. And this particular  
19 document does not have a JSC production number on it.  
20 It has a PBS number.

21 (Whereupon, the above-referred  
22 to document was marked as SBCA

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1 Exhibit No. 7-X for  
2 identification.)

3 MS. BEHAN: Your Honor, for clarification  
4 purposes, I'd like to know if he is actually  
5 representing that Superstar actually pays these fees.

6 MR. SEIVER: I'm not. I'm just going to  
7 ask him if he can look at this and draw some  
8 conclusions. If he can't, then that will be the end  
9 of my examination.

10 CHAIRMAN GRIFFITH: Any questions about  
11 that, PBS?

12 MS. BEHAN: Yes, I object. I do object on  
13 relevancy grounds. I also object to the extent that  
14 the information is within his purview and he is not  
15 providing the actual information.

16 CHAIRMAN GRIFFITH: The first question I  
17 have is: why is it -- how is it relevant?

18 MR. SEIVER: Well, I will make the  
19 proffer, and the witness is here. My point was is  
20 that the license fees for these various channels  
21 varies widely, yet they're all a la carte priced at  
22 \$2.

1 CHAIRMAN GRIFFITH: Is that --

2 MR. SEIVER: And if he thinks that this is  
3 because these are cable license fees, rather than what  
4 Superstar might pay, then I will withdraw it.

5 CHAIRMAN GRIFFITH: Let me hear over here.

6 MR. OSSOLA: Your Honor, I don't think the  
7 witness has said anything about this subject. I mean,  
8 I think he has put before the panel information that  
9 he gathered from the price lists that have gone out to  
10 the public. But in terms of what is being paid in  
11 terms of the underlying fee, he never got onto that  
12 subject.

13 MR. SEIVER: Oh, yes, he did. On pages 24  
14 through 26, we've got this entire comparison of what  
15 this alleged a la carte rate is and what the licensing  
16 fee is, and the disparity between them, Superstar  
17 permits subscribers, and this disparity is discussed  
18 at length through the next four pages.

19 MS. BEHAN: But, Your Honor, I'd just say  
20 our objection is based on the fact that what's in our  
21 testimony is what Superstar actually pays in  
22 royalties. And what -- we're comparing apples and

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1 oranges here.

2 MR. SEIVER: Very well. I'll move on.

3 CHAIRMAN GRIFFITH: All right.

4 MR. SEIVER: I'm not going to belabor that  
5 point.

6 CHAIRMAN GRIFFITH: Thank you.

7 Are you withdrawing this, then?

8 MR. SEIVER: Yes, I am. Thank you.

9 CHAIRMAN GRIFFITH: Okay. Thank you.

10 (Whereupon, the above-referred  
11 to document, previously marked  
12 as SBCA Exhibit No. 7-X for  
13 identification, was withdrawn.)

14 BY MR. SEIVER:

15 Q Let's go back to another topic. We had  
16 Mr. Trautman give a programming lineup, and for the  
17 convenience of the panel, since this is already an  
18 exhibit in evidence, I'm going to redistribute it. It  
19 shows the programming lineup and packages for TCI of  
20 Colorado, as well as for Direct TV.

21 A Right.

22 Q Mr. Desser, Mr. Trautman was a Joint

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1 Sports witness. Did you ever have the opportunity to  
2 look over this particular table?

3 A I flipped through it.

4 Q Let's assume for the moment that it is  
5 accurate as saying what the particular channels are,  
6 and TCI of Colorado's basic service in Table A-1, as  
7 well as what Direct TV's programming lineup is.

8 JUDGE GULIN: Mr. Seiver, just for the  
9 record, would you identify the document for the  
10 record, so we can refer to it later.

11 MR. SEIVER: I'm sorry. This is Table A-1  
12 and A-2 from Mr. Trautman's previously submitted  
13 direct testimony.

14 JUDGE GULIN: Thank you.

15 CHAIRMAN GRIFFITH: And which has been  
16 admitted into evidence.

17 MR. SEIVER: As I recall, yes.

18 CHAIRMAN GRIFFITH: Yes. Okay. Thank  
19 you.

20 MS. BEHAN: And A-3, correct?

21 MR. SEIVER: Is A-3 on there, too? Yes,  
22 it is. Sorry. Thank you.

1 BY MR. SEIVER:

2 Q Now, we've talked about copyright  
3 payments. Looking at TCI of Colorado Denver system,  
4 basic service column --

5 A Which page are we on?

6 Q On the first page. I'm sorry.

7 A Okay.

8 Q Starting with KWGN and then going up  
9 through The Learning Channel. Do you understand, in  
10 the cable copyright context, generally how cable pays  
11 royalties for broadcast signals it carries?

12 A Generally.

13 Q But I think you mentioned 111 before. Is  
14 that a section of the Copyright Act that covers cable  
15 royalties?

16 A Yes.

17 Q Now, do you know whether cable operator  
18 TCI of Colorado pays a royalty for local broadcast  
19 station KWGN?

20 A I don't know what the relationship is,  
21 whether it's a retransmission consent or a must carry.

22 Q Well, regardless, do retransmission

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1 consent fees get paid into the copyright office?

2 A No.

3 Q I'm asking you about the copyright  
4 obligations for a particular cable operator. You went  
5 through the statement of account for a satellite  
6 carrier, and you looked at statements of accounts for  
7 cable operators?

8 A I don't recall looking at cable forms, but  
9 I may have.

10 Q Well, let's take it, then, since it's now  
11 a retransmission consent fee you get paid in, do you  
12 understand that there is any copyright fee paid under  
13 the 111 compulsory license as a result of TCI carrying  
14 KWGN?

15 MS. BEHAN: I'm going to object. I think  
16 this calls for a legal conclusion.

17 MR. SEIVER: I'm asking him his opinion.

18 CHAIRMAN GRIFFITH: He's indicated that he  
19 has -- you think maybe you have looked at those forms  
20 occasionally?

21 THE WITNESS: I have looked at forms. I  
22 don't recall whether I ever looked at -- I'm sure I

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1 never looked at TCI of Colorado's form.

2 BY MR. SEIVER:

3 Q But generally, do you know whether there  
4 are local -- whether local broadcast stations carried  
5 by a cable system result in a copyright royalty  
6 payment?

7 MS. BEHAN: I'll object, to the extent it  
8 calls for a legal conclusion.

9 CHAIRMAN GRIFFITH: I think he could  
10 testify whether or not he has seen them on the forms,  
11 or if he generally knows general information.

12 Do you agree?

13 JUDGE GULIN: I think he can answer.

14 CHAIRMAN GRIFFITH: Yes. To the extent  
15 that he knows -- the objection is overruled. I think  
16 he can answer to the extent that he knows, if indeed  
17 he does know.

18 If you don't know, sir, just tell us.

19 THE WITNESS: I don't know as it relates  
20 to this particular station on this particular cable  
21 system.

22 CHAIRMAN GRIFFITH: Okay.

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1 BY MR. SEIVER:

2 Q All right. Then let's put this aside for  
3 a moment. Do you generally know, without relation to  
4 a particular station or a particular system, whether  
5 cable operators pay royalties for the carriage of  
6 local broadcast signals, copyright royalties? Do you  
7 know whether they do or do not?

8 A My understanding is they do not.

9 Q And that would be whether it is a  
10 broadcast network station or an independent station?

11 A Correct.

12 Q And it is also your understanding that  
13 cable operators do pay a royalty, under Section 111,  
14 for distant non-network stations, is that correct?

15 A Yes.

16 Q Is it your understanding as well that  
17 cable operators, under Section 111, pay a royalty for  
18 distant network stations as well?

19 A I don't recall.

20 Q They may or they may not, you just don't  
21 know?

22 A I know there are some rules that have to

1 do with network stations, but I don't recall  
2 specifically.

3 Q Well, would it refresh your recollection  
4 if they pay one quarter of the rate? Is that a number  
5 that sounds right for a network -- if it's a network  
6 as opposed to a distant superstation?

7 A I don't know.

8 Q Do you remember when we talked about the  
9 12 cent, three cent number that was established in  
10 1988 by the statute?

11 A Yes.

12 Q One is for network stations; one is for  
13 superstations. I believe -- you don't know why there  
14 is a disparity in that rate?

15 A I didn't recall why those particular  
16 numbers were generated, no.

17 Q When you testified in the '92 proceeding  
18 and the order came out as to the rate you testified  
19 to, do you know why there was a disparity in the  
20 superstation and the network station rates?

21 A No.

22 Q Is it irrelevant to you as far as your

1 negotiations with either broadcast stations or non-  
2 network stations for programming rights?

3 A I don't think I consider any fact in the  
4 marketplace, whether it's the true marketplace or the  
5 compulsory marketplace, to be irrelevant. I think all  
6 of those factors go into the valuation of programming  
7 rights and --

8 Q As you sit here, you don't know?

9 A No.

10 Q In your analysis of the licensing rates  
11 and the retail rates, did you have occasion to examine  
12 the economics of broadcasting a particular single  
13 signal over the air to viewers in a particular area  
14 versus what a cable operator or a DBS or a c-band  
15 distributor does with packaging signals to then be  
16 distributed to subscribers?

17 A I don't believe that was part of my  
18 testimony.

19 Q Okay. And in your negotiations for rights  
20 that -- any differences that there might be in those  
21 two businesses is not really relevant to you?

22 A I didn't say that.

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1 Q Oh. So there are differences in the  
2 economics of a broadcast station, and the economics of  
3 a cable operator who is packaging it might be relevant  
4 to you?

5 A They have different costs of doing  
6 business, different means of transmission. All of  
7 those things don't necessarily cost the same.

8 Q Now, when you sit down at the table and  
9 negotiate, are the ratings for the particular stations  
10 covered by either the network or the broadcast  
11 network, the cable network, relevant to you in the  
12 negotiating process?

13 A It's one of the factors.

14 Q Has there been a change in the ratings of  
15 the network stations and cable networks over the last,  
16 let's say, five to 10 years?

17 A You're speaking of the general  
18 marketplace?

19 Q General marketplace, just generally, yes.

20 A There has been an erosion of network  
21 viewing over that period of time.

22 Q Has there been a -- big word --

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1 concomitant increase in someone else's -- some other  
2 entity's ratings during that particular period of  
3 time?

4 A A particular network?

5 Q No, generally. Can you tell me if there  
6 is a group, just like we have the broadcast networks,  
7 that maybe -- where the cable networks' combined  
8 ratings have been increasing?

9 A Generally, the total viewing has  
10 increased.

11 Q That's in the trades, isn't it?

12 A Yes.

13 Q Did you testify in the '92 cable  
14 distribution proceeding for Joint Sports?

15 A I don't believe so.

16 Q With the change in ratings for the  
17 broadcast networks, have you seen, sitting at the  
18 table and negotiating contracts, any decline in their  
19 willingness to pay fees for rights to sports  
20 programming?

21 A The ratings have a direct impact on what  
22 it is they're able to charge for commercial time,

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1 which has an impact on what they're willing to pay.

2 Q So, again, the ratings tie into  
3 advertising, which is their pot of money that is split  
4 up among the program owners whose programs they  
5 purchase?

6 A I don't think I'd describe it as a pot of  
7 money to split up. It's not like one of these  
8 proceedings.

9 Q I'm sorry. I didn't mean it in a  
10 pejorative manner.

11 But nonetheless, during this period that  
12 the ratings have been declining, the networks have not  
13 been bashful about bidding a lot of money for sports  
14 rights as we showed before, right?

15 A I don't know about calling them bashful or  
16 not bashful. I don't have any real answer to that.

17 Q Well, during this period of time that the  
18 networks' ratings have been eroding, and the combined  
19 cable networks have been rising, has there been -- I'm  
20 not going to ask you that way.

21 Hasn't there been a rather large increase  
22 in the number of cable networks that are available to

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1 viewers in the last 10 years?

2 A Yes.

3 Q It has grown to, what, 150 or 200  
4 channels?

5 A Well, I'm not sure that they're all  
6 available to consumers, but they're available to some  
7 consumers. The average number of channels has  
8 increased.

9 Q Over cable or over satellite. Over the  
10 air has been perhaps a little more static, is that  
11 right?

12 A Yes.

13 Q And as a consequence of the increase in  
14 the number of cable networks, that has increased the  
15 number of entities that would be bidding for the  
16 rights to show your programming. Am I right?

17 A It could.

18 Q Well, ABC -- we talked about -- owns ESPN  
19 and ESPN-2. But ESPN, I guess, came into being in,  
20 what, 1978? Thereabouts?

21 A I think it was '79.

22 Q '79. There was another entity bidding for

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1 sports rights, am I right, besides the traditional  
2 networks?

3 A That was more than 10 years ago, though.

4 Q Okay. I'll move ahead. And then TNT came  
5 on the scene in about the '80s?

6 A Yes.

7 Q And WTBS became a superstation, when was  
8 that -- '70s? '80s?

9 A '76, I believe.

10 Q WGN became a superstation?

11 A '78-ish.

12 Q That's two of them. KLTA, do you  
13 remember?

14 A I don't remember when it was put on  
15 satellite.

16 Q Well, we have seven right now, and I'm not  
17 going to try to trick you. But these particular seven  
18 that we've talked about have been around for a while,  
19 haven't they? And not last year or the year before,  
20 but wouldn't you agree that these particular  
21 superstations have been at least since the '80s?

22 A Generally, yes.

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1 Q Actually, there was one more until just a  
2 few years ago, wasn't there?

3 A Yes.

4 Q And what was that station?

5 A KTVT.

6 Q And what happened there?

7 A KTVT became a FOX affiliate.

8 Q And then what happened?

9 A The common carrier decided to drop that  
10 signal.

11 Q That common carrier was Superstar, right?

12 A I believe so.

13 Q The entity that was selling all of the  
14 signals that we were looking at in the a la carte  
15 pricing list?

16 A Yes.

17 Q They stopped distributing it once it  
18 became a network, is that right?

19 A I believe so.

20 Q And they stopped distributing it, although  
21 the royalty rate for that particular station would  
22 drop from 17-1/2 cents to six cents, is that right?

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1           A       I don't recall what the rates in effect at  
2           the time that they dropped were, whether it was the  
3           17-1/2 cent rates or the --

4           Q       12 cent rates.

5           A       -- 12 cent rates.

6           Q       But it either would have gone from 12 to  
7           three, or 17-1/2 -- it wasn't Syndex proof, was it?

8           A       I don't think so.

9           Q       17-1/2 to six. But whatever. So although  
10          there is this found money, I guess, in the sense that  
11          KTVT all of a sudden was available for a fraction of  
12          what they had been paying, they quit selling it. They  
13          took it down off the satellite. Am I right?

14          A       I believe so.

15          Q       Do you know why they did that? Do you  
16          know why they made a decision like that?

17                 MS. BEHAN: I'm going to object, to the  
18          extent that it calls for speculation beyond the realm  
19          of his personal knowledge.

20                 MR. SEIVER: If he reads the trades and he  
21          knows. I'm trying to understand the economics of a  
22          lower licensing royalty to disappearance of a --

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1 CHAIRMAN GRIFFITH: It's the same  
2 situation. The objection is overruled.

3 You may answer to the extent that you  
4 know, if you do know.

5 THE WITNESS: I don't have personal  
6 knowledge.

7 BY MR. SEIVER:

8 Q I don't want you to speculate. Have you  
9 read anything in the trades that would give you some  
10 knowledge, without speculating?

11 A My recollection is that there was someone  
12 else at the time offering a FOX affiliate, but I'm a  
13 little cloudy on exactly who that was.

14 Q Now, you've talked about the a la carte  
15 rates and the royalty rates. Did you think it  
16 surprising at the time that with the royalty rate  
17 dropping to what would be this sliver, like for KDVR,  
18 that the signal would just disappear? If you could  
19 sell it for a fraction of what you were paying for it,  
20 if you could continue to sell it and pay a fraction of  
21 what you were paying for it, economically, does that  
22 make sense?

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1 A If you can effectively sell it.

2 Q Now, with the superstations at either the  
3 12-cent rate or the 14- or 17-1/2-cent rate, I think  
4 your testimony is those rates are below market. They  
5 are artificially low?

6 A Yes, I believe so.

7 Q You think that they're not even remotely  
8 related to what a rate should be for retransmitting  
9 those secondary transmissions?

10 A I think they are remotely related. That's  
11 just the point. It's too remote.

12 Q I can't remember. Did you say you felt  
13 that they were close to the cable rate or had anything  
14 to do with the cable rate?

15 A Well, there are a variety of cable rates.  
16 Cable systems pay a wide range of rates for particular  
17 signals. Some pay more than many of the basic  
18 channels. Some pay less.

19 Q Some pay none?

20 A For distant signals, I don't think they  
21 pay none.

22 Q Do you know what the rate is for a distant

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1 signal, generally? On average, nationally, for cable  
2 carriage of distant superstations, one signal?

3 A If you're only carrying one signal?

4 Q Only carrying one.

5 A I don't recall what the particular figure  
6 is. I know that the range, though, is rather wide.  
7 It depends upon your revenues.

8 Q Percentage of your revenues -- it's that  
9 nine percent of your -- or 0.09 of your basic -- 0.09  
10 percent of your basic revenues, right, that had the  
11 broadcast --

12 A . I know there are some fractional numbers,  
13 but I don't have them committed to memory.

14 Q Well, I'm going to ask you to accept,  
15 subject to an objection, that when Mr. Trautman was on  
16 yesterday, and he looked at this lineup for TCI of  
17 Colorado, Mr. Glist asked him what their copyright  
18 royalty was for carrying all of the stations, and he  
19 stated that the royalties for carrying basically TBS  
20 and WGN was about 18 cents, with no royalties for any  
21 of the others. Am I right? I mean, I'm sorry, not am  
22 I right. Will you accept that -- that that was his

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1 testimony?

2 MR. OSSOLA: I don't think that's proper.  
3 I mean, if you want to ask him to assume that that's  
4 the testimony --

5 MR. SEIVER: I'm sorry.

6 MR. OSSOLA: -- and then ask him a  
7 question based on his acceptance --

8 MR. SEIVER: I'm sorry. Well, I'll ask  
9 him to assume it, but it is a co-witness for the Joint  
10 Sports. I hope he believes he was accurate.

11 BY MR. SEIVER:

12 Q If we look at Superstar's -- so let's put  
13 the 15 cents aside. If you go to the Superstar lineup  
14 on Table A-3, and let's look at what they pay under  
15 the 119 license. Let's put the 15 cents up here so we  
16 don't forget it. That's what they pay for carrying  
17 the local networks and two distant. A-3 on -- do you  
18 see the first page of the A-3 --

19 A First page of A-3. Okay.

20 Q Do you see there is two distant  
21 superstations? KTLA -- do you know what the rate is  
22 for KTLA?

1 A That would be a 17-1/2 cent.

2 Q Okay. And how about WTBS?

3 A 14 cents.

4 Q Now, if they carried as well -- the  
5 Superview being continued onto the next page there,  
6 where it has WGN and WPIX -- I'm sorry. That was  
7 continued. I didn't see that. Do you see that on the  
8 next page?

9 A Just a second.

10 Q It's still Table A-3. Do you see how WGN  
11 and WPIX are listed at the very top? You're on --

12 A Yes.

13 Q -- A-3? Yes, you're there. Yes. See  
14 Superview continued?

15 A Yes.

16 Q So let's add in WGN. That's another 14  
17 cents, is that right?

18 A Right.

19 Q And WPIX. That a superstation.

20 A Yes, 17-1/2.

21 Q .175. Okay. And then, so we can try and  
22 make it comparable, let's say they are carrying Prime

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1 Time East, which is all of the network stations, am I  
2 right, and FOX net? So we would have, to your  
3 understanding, what, four more network stations?

4 A I'm not sure you'd call FOX net truly a  
5 network station in the meaning of this proceeding.

6 Q But it is paid -- there is a royalty paid  
7 into this copyright office for carrying it, isn't  
8 there?

9 A For FOX net?

10 Q Yes.

11 A I don't know that that's the case.

12 MS. BEHAN: Your Honor, I'm going to  
13 object again to this line of questioning. I'd just  
14 like to state the basis for my objection. First of  
15 all, the scope of cross examination does not include  
16 the direct examinations of other parties. It's pretty  
17 clear to me that we have gone way into Mr. Trautman's  
18 direct and cross examination.

19 And if they failed to follow up on things  
20 with Mr. Trautman, then I don't think using a witness  
21 who has not proffered information and says he has only  
22 a fair understanding of particular rates for cable, I

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1 don't think using him to go back and do what they  
2 should have done with Mr. Trautman is particularly  
3 proper.

4 And I also think it is of limited value,  
5 since he is having to assume everything, and he  
6 doesn't know himself whether this would be his  
7 conclusion. So I object to the line. I don't know  
8 where it's going, but I'm going to object to it for  
9 the record.

10 MR. SEIVER: My answer is that I had  
11 testimony from Mr. Desser on cable -- on satellite  
12 copyright, and I'm trying to get him to total it now.  
13 I asked him to assume what the cable copyright was.  
14 I'm trying to compare the copyright payments, since he  
15 said that all of them, at least the satellite  
16 copyright, is vastly below market. And I want to  
17 compare it to another compulsory licensing scheme that  
18 I believe will be vastly below the vastly below market  
19 rate and ask him about that.

20 MS. BEHAN: But he is testifying -- just  
21 to respond to that, he is testifying to the market and  
22 what has been fair market. Decide it as you wish, but

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1 similar compulsory licenses is not what the subject of  
2 his testimony was. I do believe it's beyond the  
3 scope. I do believe that they are different things,  
4 and I do believe that his testimony has focused on  
5 fair market value under the statute.

6 And again, I believe this line of  
7 examination on cable, if he's planning to do this with  
8 every witness, it's a little troubling, because he's  
9 going to have to spend half of the proceeding asking  
10 witnesses to assume things potentially about things  
11 that were not within the scope of their direct  
12 examination.

13 CHAIRMAN GRIFFITH: My colleagues can  
14 correct me if I'm in error, the objection is  
15 overruled. However, I can see that this is -- at  
16 least it is my opinion that this exceeds the scope of  
17 the direct examination. However, Mr. Desser is an  
18 expert, and you can present to him hypothetical  
19 situations and he can testify to those situations, as  
20 long as they're within the realm of his expertise.

21 MR. SEIVER: Very well. Thank you.

22 CHAIRMAN GRIFFITH: If you don't go too

1 much further.

2 MR. SEIVER: I have one more question  
3 here, and then one follow-up question.

4 CHAIRMAN GRIFFITH: Good.

5 BY MR. SEIVER:

6 Q Looking, again, at Table A-3, I just want  
7 to calculate -- we'll leave out FOX net, and just say  
8 Prime Time East and West, if you get one of those, you  
9 would be getting three network stations -- NBC, ABC,  
10 CBS, right?

11 A Yes.

12 Q And at the current statutory rate, that  
13 would be another 18 cents?

14 A Yes.

15 Q Darn it. Oh, whew. It shut off.

16 (Laughter.)

17 Well, if I said the operator only had to  
18 pay 18 cents, I knew I was in trouble.

19 I calculated out as we were adding, and I  
20 got 81 cents. Am I right?

21 A I'll tell you in a minute. 81, did you  
22 say?

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1 Q 81. The old-fashioned way still works.

2 A 81 cents.

3 Q So for a package of network and distant  
4 stations that Superstar sells, they pay 81 cents or  
5 your cable system in Colorado pays 15 cents?

6 A For distant network affiliates versus --

7 Q Local.

8 A -- two local distant -- two distant  
9 signals.

10 Q My last question: But you're not here  
11 testifying today that you think that the cable  
12 operator is paying less than market rates for its  
13 copyright payments for carrying signals?

14 MS. BEHAN: I'm going to object to that.  
15 I just want to object to this question. Again, I  
16 think it's beyond the scope, and I don't think it's  
17 proper.

18 CHAIRMAN GRIFFITH: The question was less  
19 than market rate?

20 MR. SEIVER: Yes. He's not here today  
21 complaining about what the cable operators are paying.  
22 But I'm asking him to assume --

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1 MS. BEHAN: I'm going to let him answer  
2 the question.

3 CHAIRMAN GRIFFITH: Okay. She is  
4 withdrawing her objection.

5 Thank you.

6 BY MR. SEIVER:

7 Q And Mr. Desser?

8 A Well, I happen to believe that the cable  
9 operators are also paying lower rates than they  
10 should, but that is not the purpose of my testimony  
11 here today.

12 Q Mr. Desser, when you testified at the last  
13 CARP rate adjustment proceeding, you gave some  
14 testimony on page 4. I'm going to ask you to refer to  
15 it. Am I confusing you with the dates? I say '92.  
16 Am I wrong? Was it '91 or '92? It was '92.

17 A Was it CARP then, or was it Copyright  
18 Royalty Tribunal?

19 Q Thank you. Very good. Here's a man that  
20 knows his law. Copyright Royalty Tribunal.

21 JUDGE GULIN: Are we referring to SBICA 5X  
22 or 6X?

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1 MS. BEHAN: 5X.

2 MR. SEIVER: 5X, the direct testimony, not  
3 the transcript. I'm sorry. I need someone to keep me  
4 straight with numbers.

5 BY MR. SEIVER:

6 Q Looking at page 4, Mr. Desser, at that  
7 first full paragraph at the top, you said --

8 A Beginning with "in addition"?

9 Q Yes. And I'll read it quickly. "Although  
10 the NBA is committed to evaluating the potential for  
11 a DBS service that can provide NBA programming  
12 directly to the public, distribution of NBA  
13 programming via satellite poses a significant risk to  
14 various NBA businesses."

15 For whatever reason, though, now the NBA  
16 does distribute programming directly to the public via  
17 such items as league pass, am I right?

18 A Via the services of the carriers, such as  
19 Direct TV and Primestar, yes.

20 Q Today as we sit here, do you see that  
21 distribution as a threat to existing NBA businesses?

22 A Yes, but I want to explain that. We view

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1 all of the various means that we use to distribute our  
2 programming to exist in an environment where there is  
3 an impact of one upon the other. Adding games to a  
4 television package, for example, impacts the value of,  
5 say, a radio package. So this doesn't exist in a  
6 vacuum, and each form of distribution has some impact  
7 on the others.

8 Q And you sell to every form of  
9 distribution, is that right? You've not categorically  
10 excluded any particular one?

11 A When you say "we," do you mean the NBA  
12 itself?

13 Q Yes, the NBA itself.

14 A The NBA doesn't generally sell to  
15 independent --

16 Q I'm sorry.

17 A -- television stations.

18 Q You sell to the broadcast networks,  
19 superstations, cable nets, and direct?

20 A Yes.

21 Q And what you were talking about before was  
22 the direct or cable nets to superstations and direct?

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1 I mean, when you said the DBS service, do you mean  
2 that DBS service?

3 A Well, at the time that this was written,  
4 that DBS service didn't exist.

5 Q Okay.

6 A So it was not specific to that at the  
7 time.

8 Q The next paragraph, first sentence,  
9 "Similarly, an artificially low rights fee severely  
10 compromises the NBA's ability and incentive to create  
11 and market your delivery options like a package of DBS  
12 games for the public." What did you mean when you  
13 said "an artificially low rights fee"?

14 A That referred to the compulsory license  
15 fees that existed at the time.

16 Q The 12 cents and three cents?

17 A Yes.

18 Q And you thought they were artificially  
19 low, and also compromised your ability to sell a  
20 package of DBS games to the public, right?

21 A Yes.

22 Q The next sentence, "Based on my

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1 experience, it will be difficult, if not impossible,  
2 to successfully develop a new DBS distribution service  
3 in competition with retransmitted distant signals, if  
4 the NBA television product is already available to  
5 satellite distributors through those distant signals  
6 at far below market prices."

7 Your testimony, then, was that as long as  
8 we had the compulsory license rate below market, that  
9 it wouldn't be just difficult, it would be impossible  
10 to successfully develop a DBS distribution service,  
11 right?

12 MS. BEHAN: Objection. That's not what  
13 the testimony says.

14 CHAIRMAN GRIFFITH: The objection is  
15 overruled.

16 You can explain what you meant by what it  
17 was that he just read to you.

18 MR. SEIVER: I liked my characterization.  
19 Very well.

20 BY MR. SEIVER:

21 Q Will you explain what you meant?

22 A Sure. Our concern at the time was -- and

1 we didn't know where DBS was going and just how many  
2 more distant signals that would be out there. Our  
3 concern is that very low rights fees could be an aid  
4 to the perpetuation of many, many more distant  
5 signals. And if there are many more distant signals,  
6 our ability to be able to sell this kind of package  
7 would be severely compromised.

8 Fortunately, there are not today many more  
9 distant signals. One of the reasons that we've been  
10 involved in that litigation that was brought up  
11 earlier with WGN had to do with our concerns about  
12 more product being out in the marketplace that would  
13 negatively impact our ability to be able to negotiate  
14 these arms-length agreements that we've negotiated.

15 Q Mr. Desser, you said your concern was --  
16 and luckily -- about the proliferation of  
17 superstations, that luckily there are not many more.  
18 Since the time you last testified, hasn't the number  
19 of superstations gone down?

20 A Are you referring to --

21 Q Since 1992, what has happened?

22 A Are you talking about just that one -- the

1 KTVT example?

2 Q This is your chart. You listed all of the  
3 superstations that are in existence today. Were those  
4 all around in '92?

5 A I believe they were all around in '92,  
6 yes.

7 Q In fact, there was one more in '92. So  
8 it's not that there were going to be many more today.  
9 There are less today.

10 A Well, that I think is ignoring quite a few  
11 more network signals.

12 Q Well, we weren't talking about network  
13 signals, were we?

14 A This talks about signals.

15 Q So the distant network signals is also a  
16 concern of yours, then?

17 A Sure.

18 Q That proliferation.

19 A The proliferation of signals generally  
20 that would be carrying NBA programming.

21 Q And you thought that the low fees -- let  
22 me bring this up. These low fees would lead to that

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1 proliferation?

2 A That's a concern.

3 Q But at least for KTVT, going from one low  
4 fee to an incredibly low fee, wound up with it going  
5 away?

6 A Changed its affiliation.

7 Q Right. And as far as the particular  
8 superstation signals, there has been no increase in  
9 those, if anything? There has been no increase in  
10 those since '92? Just the superstations, right?

11 A I think that is correct.

12 Q Would it be fair to say that your  
13 statement in 1992 and your testimony was, therefore,  
14 inaccurate because you had developed a new delivery  
15 option for DBS that has been successful?

16 A No, I don't think this is inaccurate.

17 Q But you have developed those DBS programs?

18 A We have developed a DBS program. I  
19 believe that that is not unrelated to the fact that  
20 there are not many more superstations today.

21 Q But I thought there was a proliferation of  
22 network -- distant network stations?

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1           A       There are some more distant network  
2       stations.

3           Q       But that didn't hurt you, did it?

4           A       So far it hasn't had a big impact.

5           Q       Thank you.

6                   Will you take one last look at the Mr.  
7       Trautman exhibit, Table A-2. I'm sorry. It's Exhibit  
8       5? 6? I guess it's Table A-1. I'm sorry. Table  
9       A-1. Direct TV programming lineup. I guess it's  
10      Table A-2. Direct TV programming lineup. I just want  
11      to look at what they have.

12                  Mr. Trautman goes down and has "out-of-  
13      market regional sports." Do you see where that's  
14      listed? Do you know how many out-of-market regional  
15      sports networks there are?

16           A       Where are you pointing to? I'm sorry.

17           Q       Does that help?

18           A       Well, there are a variety of regional  
19      sports networks. Some of the programming on those  
20      networks is available in various Direct TV packages.

21           Q       Do you know --

22                   MR. SEIVER: I need another exhibit. It's

1 the JSC exhibit that has -- I believe this is -- I  
2 thought this was going to be able to do it -- the JSC  
3 Direct TV lineup. Is it 10 or 11? Can somebody help  
4 me? I think it is 2; 2 is all of the Direct TV  
5 information. JSC 2, page 03, starts the packages and  
6 what is in it. Well, they don't list them here.

7 I don't have an exhibit that is in the  
8 record. I'm going to need to show you a document that  
9 I have not -- I would like to be able to establish how  
10 many out-of-market networks there are. My fear has  
11 been -- with all due respect, indulgence for just a  
12 moment?

13 CHAIRMAN GRIFFITH: Okay.

14 MR. SEIVER: Finally. If I can get an  
15 agreement from the parties, I just want to show him  
16 Kagan's state of DBS, 1996. I'm going to ask him to  
17 look at where it shows programming lineups and Direct  
18 TV, and there are a number of different programming  
19 services that are listed.

20 BY MR. SEIVER:

21 Q I didn't know if you would have the  
22 number, but there is more than 10, aren't there?

1 JUDGE GULIN: Could he take a look at  
2 them? Do you want to take the time to do that?

3 MR. SEIVER: Well, I was going to copy it  
4 so that they could have it later. But if the witness  
5 is gone -- I don't want to delay it. This is my last  
6 set of questions. Does anybody else need to look at  
7 this before I show it to the witness?

8 I'll put on the record what pages I'm  
9 going to show the witness. May I proceed?

10 CHAIRMAN GRIFFITH: Sure.

11 BY MR. SEIVER:

12 Q I'm going to show the witness -- and I  
13 will make copies for all parties and the panel as soon  
14 as possible -- pages 134 and 135 from Paul Kagan's  
15 state of DBS 1996. You're familiar with Paul Kagan,  
16 right?

17 JUDGE GULIN: Excuse me. We'll call that  
18 SBCA 7X when it's available?

19 MS. WOODS: Your Honor, I thought we were  
20 on 8X.

21 MR. SEIVER: I withdrew 7, yes.

22 MS. WOODS: Yesterday we had one that was

1 withdrawn and we just kept going. I think, as we've  
2 done in the past, it's easier to just skip --

3 JUDGE GULIN: Okay. We'll make it 8.

4 CHAIRMAN GRIFFITH: 8X.

5 MR. SEIVER: Thank you.

6 (Whereupon, the above-referred  
7 to document was marked as SBCA  
8 Exhibit No. 8-X for  
9 identification.)

10 MR. SEIVER: May I approach the witness?

11 BY MR. SEIVER:

12 Q Looking at the programming lineups, if  
13 this will refresh your recollection where it says  
14 sports, I'll represent to you that the D column is  
15 Direct, U is USSB, P is PrimeStar, E is EchoStar, A is  
16 AlphaStar. There's a listing of various sports  
17 networks that are available on different carriers. Do  
18 you see them? Classics Sports, ESPN, ESPN-2, Golf  
19 Channel, NewsSport -- well, Outdoor Life and Speed  
20 Vision, regional channel, regional sports network, MSG  
21 -- do you know what that is?

22 A Madison Square Garden.

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1 Q What do they show?

2 A A lot of sports programming, including the  
3 Yankees, Rangers, Knicks.

4 Q The Yankees are also on WPIX, am I right?

5 A There are Yankees games also on WPIX.

6 Q Madison Square Garden is a competitor to  
7 show the Yankee games, am I right?

8 A Well, actually, it's Madison Square Garden  
9 that sells those games to WPIX.

10 Q I see.

11 Sports Network, Home Team Sports, Sports  
12 South, Sunshine, PASS -- do you know what that is?

13 A Stands for ProAm Sports Systems. It's in  
14 the Detroit area.

15 Q MSC?

16 A Midwest Sports Channel.

17 Q And then the Sports Channel New York,  
18 Philadelphia, Ohio, Cincinnati, Chicago, Pacific --  
19 those are all separate channels?

20 A Yes.

21 Q Prime Sports -- is that what is now  
22 Liberty?

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1           A       No. This is Prime Sports KBL. That's --  
2       I think it's Pittsburgh.

3           Q       And then Southwest, West, Northeast,  
4       Northwest?

5           A       Right.

6           Q       Intermountain, and it goes on, Upper  
7       Midwest, Empire, are all sports outlets on DBS, am I  
8       right?

9           A       They are regional sports networks,  
10      generally. Not the first few that you mentioned,  
11      however.

12          Q       Would it be fair to say that there has  
13      been a proliferation of sports networks on DBS?

14          A       What do you mean by "proliferation"?

15          Q       Well, were there any when you last  
16      testified in '92?

17          A       There were regional sports networks in  
18      existence. They were carried on c-band and offered to  
19      the home dish market. In 1992, only Primestar was in  
20      operation and did not carry any regional sports at  
21      that time.

22          Q       And we've established no increase in

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1 superstations, a proliferation in distant network  
2 stations, but there has been an increase in the number  
3 of regional sports networks. Is that right?

4 A No. The number of networks has not  
5 appreciably increased.

6 Q But they continue to exist. They have not  
7 gone out of business. They continue to exist on DBS  
8 and cable?

9 A Some have gone out of business. I think  
10 Sports Channel LA went out of business in that time  
11 period.

12 Q Would it be fair to say that in the '92  
13 testimony that, in fact, your ability to develop  
14 things like league pass, and Major League Baseball to  
15 sell its package, NHL to sell Center Ice, would  
16 indicate that the rates that superstations have for  
17 their royalties are really of no impact?

18 A No, I don't think that's the case.

19 Q Well, you were able to successfully  
20 develop the DBS package, despite your testimony?

21 A We have been able to develop it.

22 MR. SEIVER: Thank you. That's all I

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1 have.

2 CHAIRMAN GRIFFITH: Okay.

3 How long do you anticipate your redirect  
4 might take? Are there any other --

5 MS. BEHAN: I think --

6 CHAIRMAN GRIFFITH: -- cross examiners?

7 MS. BEHAN: I think there might be others.

8 I'm not --

9 MR. OSSOLA: Your Honor, I'm going to have  
10 just a few questions.

11 CHAIRMAN GRIFFITH: Okay. Do you want to  
12 take just five minutes?

13 MS. BEHAN: Yes, let's take five minutes.

14 CHAIRMAN GRIFFITH: Okay.

15 (Whereupon, the proceedings in the  
16 foregoing matter went off the record at  
17 4:44 p.m. and went back on the record at  
18 4:52 p.m.)

19 CHAIRMAN GRIFFITH: All right.

20 CROSS EXAMINATION

21 BY MR. OSSOLA:

22 Q Mr. Desser, I'm Chuck Ossola, representing

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1 the Commercial Networks. I just have a few questions  
2 for you.

3 You were asked by Mr. Seiver a question  
4 about the -- I think about the total revenues earned  
5 by the networks. Do you recall being asked that?

6 A Yes.

7 Q Am I correct that you don't know what the  
8 total revenues from the Commercial Networks are now or  
9 ever?

10 A Not off the top of my head, no.

11 Q Whatever those revenues are, putting aside  
12 the portion of the revenues that may be attributable  
13 to Section 119 royalties, is it your understanding  
14 that those revenues are derived from the exercise of  
15 rights and marketplace negotiations by the networks in  
16 the marketplace?

17 A And you're speaking of the --

18 MR. SEIVER: I'm going to have to object.  
19 If he doesn't know what they are, then how is he going  
20 to know this follow-up question?

21 MR. OSSOLA: Well, I'm not asking him for  
22 a number. I'm asking him for his understanding about

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1       how the network's money is derived.

2                   CHAIRMAN GRIFFITH:     The objection is  
3       overruled. He can answer to the extent that he knows,  
4       if he knows.

5                   THE WITNESS:    Could I ask you to restate  
6       the question?

7                   BY MR. OSSOLA:

8               Q     Let me do that.     Do you have any  
9       understanding as to how the Commercial Networks derive  
10      revenues?

11              A     Yes.

12              Q     Could you briefly describe what your  
13      understanding is?

14              A     Their primary business is selling  
15      advertising to advertisers on a national basis. They  
16      also have ownership positions in some programming and  
17      derive revenues in that manner, whether they be by  
18      syndicated sales or by international sales. There are  
19      also other businesses that they're in -- cable,  
20      etcetera.

21              Q     Is it your understanding that those  
22      revenues to which you just referred are the product of

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1 arms-length transactions?

2 A Generally, yes.

3 Q In the case of advertising revenues, for  
4 example, is it your understanding that advertisers pay  
5 based on what they perceive to be the value of  
6 reaching the audiences that the networks can reach?

7 A Yes.

8 Q You also referred to, in respect to the  
9 Section 119 royalties, I believe you referred to the  
10 division of those royalties among the claimants. Do  
11 you recall being asked about that?

12 A I remember it being an item of discussion  
13 in the hearing.

14 Q Is it your understanding that the networks  
15 participate in that division of revenues from the  
16 Section 119 royalties?

17 A Yes.

18 Q Is it your understanding that there are  
19 other participants in that division of revenues?

20 A Yes.

21 Q Could you just simply identify those?

22 A Sports, PBS, Music, Program Producers,

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1 Devotional Claimants, and I may be missing one. I  
2 apologize to whoever in the room that is.

3 Q So it's fair to say, is it not, that the  
4 Commercial Networks are not obtaining access to -- are  
5 not securing all of the Section 119 royalties? You  
6 didn't mean to suggest that, did you?

7 A That's not my understanding.

8 Q Rather, it's shared among the groups that  
9 you just described, is it not?

10 A I'm not familiar with the precise manner  
11 in which the various, you know, revenue streams that  
12 go into the pot are shared precisely.

13 Q I'm only asking whether it is your  
14 understanding that, in fact, they are shared, is that  
15 correct?

16 MR. SEIVER: Objection. I think the  
17 witness said he doesn't know. And I don't think it's  
18 fair for you to ask him.

19 MR. OSSOLA: I think the witness testified  
20 he didn't know how it was shared, and I'm simply  
21 trying to clarify that, in fact, he understands --

22 CHAIRMAN GRIFFITH: The question, as I

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1 understand it, is whether they are shared.

2 MR. OSSOLA: That's correct.

3 CHAIRMAN GRIFFITH: Can you answer that  
4 question?

5 THE WITNESS: Yes.

6 CHAIRMAN GRIFFITH: Are they shared, or  
7 not?

8 THE WITNESS: That's my understanding.

9 CHAIRMAN GRIFFITH: That they are?

10 THE WITNESS: That they are shared, yes.

11 CHAIRMAN GRIFFITH: Okay.

12 BY MR. OSSOLA:

13 Q Mr. Desser, you also referred to, during  
14 Mr. Seiver's examination, to the decline in the  
15 ratings of network stations. Do you recall that?

16 A I believe I was responding to the question  
17 as it relates to the decline of networks, not  
18 necessarily the stations individually.

19 Q So with reference to the networks  
20 themselves, your testimony was directed towards a  
21 decline in ratings for the network programming?

22 A Yes.

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1 Q Okay. Now, during the period in which  
2 this has occurred, do you have any understanding as to  
3 whether or not there has been a rise in competition  
4 from the cable networks?

5 A Yes.

6 Q And could you characterize what your  
7 understanding of that rise in competition has been?

8 A It's derived, I'd say, from three factors  
9 -- more cable networks distributed to more households,  
10 containing generally more production value, or at  
11 least, you know, there has been a trend towards, you  
12 know, putting better and better programming on at  
13 least some of the networks.

14 Q Is the result that there is simply more to  
15 choose from in the marketplace from your perspective?

16 A Generally speaking, yes.

17 Q One of the subjects that Mr. Seiver  
18 inquired into had to do with exclusivity. And I  
19 wonder if you could clarify for me how it is that the  
20 NBA, for example, views its business objectives being  
21 satisfied with respect to the networks by allowing  
22 broadcasts of games in various venues.

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1 A Can you be more specific?

2 Q Yes. Why don't we start with: can you  
3 describe the NBA's arrangements with the commercial  
4 networks with respect to exclusive right to broadcast  
5 NBA games?

6 A Yes.

7 Q Could you do so, please?

8 A We have an exclusive arrangement with NBC,  
9 which provides for NBC to have the exclusive national  
10 broadcast rights to certain games, and it has a  
11 variety of restrictions that are placed upon us, in  
12 terms of what we can do with those games and with  
13 other games in other media, at that time and at other  
14 times.

15 Q Do those arrangements leave you, meaning  
16 the NBA, free to negotiate different arrangements with  
17 respect to other NBA games not covered by your  
18 arrangement with NBC?

19 A To an extent. There are certain  
20 limitations as a result of our agreement with NBC on  
21 what we can sell to various third parties.

22 Q And those limitations, however, are a

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1 product of your arms-length bargaining with NBC over  
2 the terms of the exclusive arrangement, is that  
3 correct?

4 A Yes.

5 Q So is it fair to say that those represent  
6 NBA's business judgments as to what it chooses to  
7 accept with respect to restrictions imposed by that  
8 agreement, and what it chooses not to accept?

9 A Generally, there has been a business  
10 judgment that for the variety of consideration that we  
11 receive, and the variety of programming that we  
12 supply, that this is an appropriate arrangement for us  
13 to make. I think it's more difficult when you start  
14 talking about any given element, because you have to  
15 really look at it, you know, as a whole.

16 Q When you look at the transaction as a  
17 whole, does it matter what NBC intends to do with  
18 respect to broadcast of the games?

19 A Yes.

20 Q And in your current understanding with  
21 NBC, can you just briefly summarize what rights NBC  
22 does have with respect to that broadcast?

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1           A       The principal rights involve the right to  
2       disseminate to all its affiliates the particular  
3       programs that are set forth in the agreement, which  
4       include major NBA events, to do so completely, and on  
5       a live basis.

6           Q       In granting that right and agreeing that  
7       that right should be part of the transaction, did the  
8       NBA look at what it thought the impact of that  
9       arrangement would be on the value of the rights it was  
10      granting?

11          A       I'm afraid I don't understand the  
12      question.

13          Q       Let me rephrase it, then. Is it fair to  
14      say that the NBA thought that this transaction would  
15      be a benefit in terms of the value of NBA, the rights  
16      to NBA games in the marketplace -- in other words, a  
17      benefit?

18          A       Well, we felt that the agreement was a  
19      beneficial agreement for us, or we wouldn't have  
20      entered into it.

21          Q       And can you describe the elements of that  
22      benefit from the standpoint of the NBA? I mean, what

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1 was beneficial about it?

2 A The fees that we received, the promotional  
3 benefits that we received, the other programming that  
4 the network agreed to program as part of the overall  
5 agreement -- pre-game shows, shows targeted to  
6 teenagers, that sort of thing.

7 Q And for those benefits, did the NBA  
8 believe that whatever amounts were paid, whatever the  
9 financial considerations were, were adequate in  
10 proportion to the benefits that the NBC was receiving?

11 A Generally, yes.

12 Q Now, with respect to those particular  
13 games that are the subject of the exclusive  
14 arrangement with NBC, does anyone else have the right  
15 to broadcast those games nationally?

16 A There are some residual rights after the  
17 completion of the broadcast. But if your question is:  
18 does anyone have the right to broadcast those games --

19 Q During the game.

20 A -- while the games are taking place, other  
21 than NBC, the answer is no.

22 Q Now, with respect to the rights to games

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1 other than those that the NBC is entitled to broadcast  
2 exclusively, what entity or entities have the right to  
3 broadcast those games?

4 A There are a variety of entities, as I  
5 testified to earlier. Some of them are cable  
6 networks, local stations, regional sports networks,  
7 even DBS carriers.

8 Q The mix of parties that were referred to  
9 here in this exhibit?

10 A Yes.

11 Q And did the NBA make its own business  
12 judgment as to how to distribute the rights among that  
13 mix to those differently situated parties?

14 A Generally speaking, yes, with the  
15 exception of superstations insofar as they are  
16 retransmitted.

17 Q You're talking about secondary  
18 transmissions?

19 A Yes.

20 Q That's the only exception to the NBA's  
21 exercise of control over how that mix of rights is  
22 allocated?

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1 A Yes.

2 MR. OSSOLA: I have nothing further.

3 Thank you.

4 CHAIRMAN GRIFFITH: All right.

5 Any other parties to cross examine?

6 All right. Redirect?

7 MS. BEHAN: We do.

8 CHAIRMAN GRIFFITH: Thank you.

9 REDIRECT EXAMINATION

10 BY MS. BEHAN:

11 Q I know you're tired, Mr. Desser. So I'll  
12 just spend a few minutes with you, okay?

13 First of all, Mr. Desser, Mr. Seiver asked  
14 you a number of questions about the fees that the  
15 sports interests receive from the broadcast networks,  
16 correct?

17 A Yes.

18 Q And from WGN?

19 A Yes.

20 Q And WTBS?

21 A Yes.

22 Q Okay. And I believe you said that the

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1 amount of those fees were determined in what are  
2 essentially free market negotiations?

3 A Yes.

4 Q Okay. Now, Mr. Desser, do you believe  
5 that the fact that you received those fees in those  
6 free market negotiations means that the satellite  
7 carriers should be, then, allowed to exploit your  
8 telecasts pursuant to a compulsory license?

9 MR. SEIVER: Objection. Leading. Very  
10 leading. This is redirect, not cross.

11 CHAIRMAN GRIFFITH: I think it is leading.  
12 Do you want to rephrase it?

13 MS. BEHAN: Yes, I can rephrase it.

14 CHAIRMAN GRIFFITH: All right. Thank you.

15 BY MS. BEHAN:

16 Q Okay. Mr. Desser, did you understand --  
17 or what did you understand to be the implication of  
18 his line of questioning along the lines of the fees  
19 that you received in these free market negotiations?

20 A The revenues that we receive for  
21 licensing, say, WTBS, recognize that we're going to  
22 receive some additional amount from these copyright

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1 proceedings. Turner knows that. We know that. And  
2 for that matter, in the case of WGN, that's another  
3 party that similarly recognizes that. And it's one of  
4 the factors that goes into the negotiation.

5 You know, they understand that we're  
6 getting additional compensation. They don't believe  
7 -- at least it's not my understanding that they  
8 believe that they have, you know, paid the full cost  
9 of the programming solely in connection with the  
10 rights fees that they have paid to us.

11 Q Mr. Desser, let me rephrase the question,  
12 okay, a little bit. Is it your position that the --

13 MR. SEIVER: I'm going to object, because  
14 that is already leading. Is it your position that --  
15 this is --

16 MS. BEHAN: I was just going to go over  
17 something he has already stated in his direct  
18 testimony, so that I can --

19 CHAIRMAN GRIFFITH: Let me hear the  
20 question first.

21 MS. BEHAN: I'll go ahead.

22 MR. SEIVER: I just was objecting so that

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1 there wouldn't be an --

2 MS. BEHAN: Okay.

3 MR. SEIVER: -- answer.

4 MS. BEHAN: All right. All right. All  
5 right.

6 BY MS. BEHAN:

7 Q Mr. Desser, do you think that the  
8 Satellite Carriers, under the current compulsory  
9 license, are paying the fair market value of the  
10 signals upon which your programming is carried over  
11 satellite?

12 A No, I do not.

13 Q Okay. Do you believe that, as a result,  
14 the Satellite Carriers are exploiting your telecasts?

15 MR. SEIVER: I object, Your Honor. This  
16 is Ms. Behan testifying.

17 MS. BEHAN: I'm not testifying. I'm  
18 asking his understanding.

19 MR. SEIVER: Is it his belief that they  
20 exploit?

21 MS. BEHAN: Exploitation is a term of  
22 copyright art of law, and I think he is --

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1 CHAIRMAN GRIFFITH: Once again, we need to  
2 hear the whole question.

3 MR. SEIVER: I'm sorry, Your Honor. It's  
4 just that I'm hearing testimony come out that is going  
5 to be a yes or no answer. And then it's --

6 CHAIRMAN GRIFFITH: Okay. Go ahead,  
7 please.

8 MS. BEHAN: I don't think the mere fact  
9 that there is going to be a yes or no answer is  
10 determinative of the question of whether it's leading,  
11 for one. But be that as it may --

12 BY MS. BEHAN:

13 Q Mr. Desser, what, in your view, is the  
14 relationship between the fees that you receive in free  
15 market negotiations for your programming and the fees  
16 that carriers pay for that same programming through  
17 the compulsory licensing proceeding?

18 A I believe that the fees that we receive in  
19 free market negotiations are greater than, and more  
20 closely represent the value of our programming, than  
21 that that we have historically received through the  
22 compulsory license. And I believe that the carriers

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1 are obtaining the right to sell very valuable  
2 programming under this license.

3 I think you have to look at the end of the  
4 day at what it is that they obtain under this license,  
5 and then have the ability to go out into the  
6 marketplace and sell. It is the programming on those  
7 signals that people want to watch, and that people are  
8 willing to pay the carriers for providing.

9 Q Do you have an opinion about whether  
10 Program Suppliers should be able to sell their  
11 programming as many times as buyers are willing to buy  
12 that programming?

13 MS. WOODS: Your Honor, if we could just  
14 clarify that Program Suppliers is not the --

15 MS. BEHAN: Programmers.

16 BY MS. BEHAN:

17 Q Do you have an opinion?

18 A My opinion is that copyright gives the  
19 copyright holder the right to decide how to slice and  
20 dice their programming. They can sell it to network.  
21 They can sell it to cable. They can sell it to  
22 satellite. They can sell it locally, nationally,

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1 internationally. They can sell it on home video.

2 We do almost all of those things in  
3 varying amounts and various forms, because that's what  
4 we do. We create programming, and then we look for  
5 ways of selling it. We sell it to people who consume  
6 it in the arenas. We sell it to people who read  
7 books. That's our core business.

8 And it, in my opinion, should be our  
9 decision, our business decision, how best to exploit  
10 those rights that we've paid for creating. We pay the  
11 players. We pay the coaches. We construct, in many  
12 cases, or lease the arenas that the games take place  
13 in. We are involved in creating the underlying  
14 product -- the game itself -- which ultimately results  
15 in a telecast, which is something else that we  
16 negotiate over.

17 And that is the -- it's that end result  
18 that ultimately the cable -- I'm sorry -- the carriers  
19 are selling to their subscribers, and that is  
20 something that I think we are in a better position to  
21 judge the value of and determine how best to allocate  
22 those various rights against the wide range of options

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1 that we have.

2 That isn't the subject of this hearing at  
3 this point. We are not here to decide whether there  
4 should be or shouldn't be a license. We're here to  
5 decide what that license is worth.

6 My point is that what the license is worth  
7 is a great deal, because they have the ability to take  
8 and distribute our product without our permission,  
9 over our objections, and based only on their decision  
10 whether or not to do it, not ours, and all they have  
11 to do is pay the fee.

12 Q Now, Mr. Desser, how much control do you  
13 have over how many signals with sports on them that  
14 various Satellite Carriers choose to carry through the  
15 compulsory license?

16 A None.

17 Q Okay. And how much control do you have  
18 over the packaging options that the various Satellite  
19 Carriers here today have in deciding how to package  
20 signals that have sports programming on them?

21 A None.

22 Q Okay. And how much control do you have

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1 over the number of channels that the Satellite  
2 Carriers choose to devote to signals that have your  
3 sports programming on them?

4 A As it relates to retransmitted signals,  
5 none. We have some control over the number that are  
6 allocated when we make an arms-length transaction with  
7 them.

8 Q Okay. And so do you recall Mr. Seiver had  
9 a line of examination about the fact that there was  
10 about the same number of signals of superstations  
11 today as before?

12 A Yes.

13 Q Okay. And I believe you testified that  
14 there were more network signals?

15 A I think there are a couple more network  
16 signals and one fewer superstation signals. The total  
17 number is close.

18 Q Okay. In light of your inability to  
19 control, as you just testified, the number of signals  
20 that they carry and the number of ways that they  
21 package those signals, do you have any concerns about  
22 the future impact of having your signals available at

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1 what you believe to be lower-than-market rates for  
2 your ability to sell in the marketplace?

3 MR. SEIVER: I just want to object to  
4 that. I think that is beyond the scope. His signals?

5 MS. BEHAN: Signals with his programming  
6 on them. Thank you.

7 CHAIRMAN GRIFFITH: Thank you.

8 THE WITNESS: Yes, I do have a concern,  
9 because I believe that when you have -- when you have  
10 a product that is your product out in the marketplace,  
11 over which you don't have any control, you know, there  
12 is two forms of an impact. One is the fact that, you  
13 know, certain parties have to negotiate with you and  
14 pay, you know, a market rate. They are certainly not  
15 happy when they find that other parties are able to  
16 obtain that product or a similar product at some other  
17 rate.

18 And then that ultimately leads to a  
19 situation where those same people, when they  
20 renegotiate an arrangement, have the opportunity to  
21 think twice about how much they want to pay. And the  
22 low market rates can have an effect of depressing the

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1 market rates.

2 BY MS. BEHAN:

3 Q All right. Mr. Desser, in light of the  
4 compulsory license, how many sports programs through  
5 the compulsory license would it be possible, over the  
6 course of the year -- I'm just looking for an estimate  
7 -- for the Satellite Carriers to sell through packages  
8 to subscribers without having to negotiate with you at  
9 all in the free marketplace? Have you considered all  
10 of the sports on all of the carriers?

11 A As long as the carriers have the ability  
12 to choose virtually any broadcast signal, and to  
13 distribute that signal, I can't really project the  
14 number of events. It's a very large number. You  
15 think of the number of sporting events televised in  
16 individual markets on, you know, some 1,500 television  
17 stations. At least theoretically, there could be, you  
18 know, tens of thousands of events being distributed.  
19 I can't be any more precise than that.

20 Q Okay. Now, Mr. Seiver also asked you  
21 about Mr. Trautman's tables in the appendices. And  
22 without going into those exhaustively, I'd like to ask

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1 you a question. He asked you, I believe, about the  
2 price of -- or how much the Denver cable system would  
3 pay under Section 111 for one station. Do you recall  
4 that? And he said 15 cents? He asked you to assume  
5 15 cents for one signal?

6 MR. SEIVER: That was a mistake. That was  
7 for two signals.

8 MS. BEHAN: Oh. 15 cents for two signals?

9 MR. SEIVER: Yes.

10 MS. BEHAN: Okay.

11 BY MS. BEHAN:

12 Q Do you know what cable operators have to  
13 do if they seek to carry multiple signals of  
14 superstation signals that carry sports programming?

15 MR. SEIVER: Objection. I was prohibited  
16 from going into this in detail by objection from Joint  
17 Sports that he did not know -- and I had to get him to  
18 assume the 15 cents from Mr. Trautman. I think this  
19 is entirely improper to go now, him as an expert, to  
20 know how cable copyright is calculated on the third or  
21 more signal.

22 MS. BEHAN: I think it's extraordinary

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1 that he has gone as far as he has into that line of  
2 questioning, doing only -- you know, using an expert  
3 witness to come up with hypotheticals that he is  
4 trying to put his case in, and then he won't let us  
5 ask a question which goes directly to the heart of  
6 redirect on what the real rate the cable operators  
7 would pay, as opposed to the 15 cents that he is  
8 suggesting, should be put into evidence through his  
9 assumption.

10 CHAIRMAN GRIFFITH: All right.

11 MR. SEIVER: If he knows, Your Honor, then  
12 I'm going to go back and I'm going to say, "What is  
13 the rate that they were paid?" I had to get him to  
14 assume, and there was an objection. This is improper.

15 MS. BEHAN: I'm not asking about the  
16 specific rates. I'm asking if he knows how the rates  
17 are structured for multiple signals as opposed to two  
18 signals or one signal. I think it's significant. I'm  
19 just asking if he knows that. I'm not asking for  
20 particular rates.

21 MR. SEIVER: He can't answer that on his  
22 own admission.

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1 MS. BEHAN: He hasn't been asked that  
2 question by you, because you avoided the whole line of  
3 examination on multiple signals.

4 MR. SEIVER: On your objection, ma'am.

5 CHAIRMAN GRIFFITH: The objection is  
6 overruled.

7 He can answer to the extent that he is  
8 able to, and cross examine him.

9 THE WITNESS: The rates, as I understand  
10 them -- and I don't know the precise number that is  
11 used for the first signal or the second signal -- it  
12 is based upon a fraction times the rates that are  
13 charged for this package of basic cable services. I  
14 do know quite clearly that once you get beyond the  
15 second signal, the rates jump up substantially to the  
16 point that the third signal and each signal thereafter  
17 is paid for at the rate of 3.75 percent of the retail  
18 price that is charged by the cable system.

19 And so, you know, as you look at, for  
20 example, a package of programming from Superstar,  
21 where they'll package in four or five superstations,  
22 if you then look at what it would cost for cable to

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1 deliver the same thing, you'd say it's 3.75 times  
2 three signals, plus the amount for those first two  
3 signals. So maybe it's 12 percent or something like  
4 that. It's a pretty significant rate.

5 CHAIRMAN GRIFFITH: Okay.

6 BY MS. BEHAN:

7 Q Okay. Mr. Desser, I think this is my last  
8 topic. Mr. Seiver asked you a lot of questions about  
9 exclusivity. He also asked you a lot of questions  
10 about WGN and the Bulls. I'm not going to go into the  
11 litigation, but I want to clarify your position on  
12 exclusivity.

13 Can you turn to Joint Sports Claimants  
14 Exhibit 2, at page 18? All right. First of all, what  
15 is this exhibit, to the best of your understanding?

16 A This is material that was obtained from  
17 the Direct TV web site. It includes a variety of  
18 information on the various packages that they offer,  
19 some history about Direct TV, and I think, in  
20 particular -- it's page 18. I'm sorry.

21 CHAIRMAN GRIFFITH: Thank you.

22 THE WITNESS: In particular, beginning on

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1 page 18, relevant to the discussion about exclusivity,  
2 is a very detailed description of all of the various  
3 blackout restrictions that, as a result of those arms-  
4 length transactions, we have agreed with Direct TV to  
5 impose in order to protect the exclusivity in the  
6 regional sports case in the local market, the  
7 broadcast case in the local market, as I had discussed  
8 before.

9 I won't go into all of what is here, but  
10 I would just suggest that it's a very common element  
11 in those arms-length transactions. And as you can see  
12 by the detail, it's a pretty important issue,  
13 certainly for sports interests.

14 BY MS. BEHAN:

15 Q Mr. Desser, could you read what Direct TV  
16 -- first of all, is Direct TV a participant in this  
17 proceeding, to the best of your understanding?

18 A I believe they are represented by the SBCA  
19 in this proceeding.

20 Q Could you go to point 1, generally, before  
21 key points? Could you read to me what Direct TV says  
22 in point 1 about blackouts?

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1           A       "Blackout restrictions can apply to  
2 professional or college sports.

3           MR. SEIVER: Let me object just for a  
4 moment. I know that redirect is supposed to be  
5 limited to recross, and I don't think I asked about  
6 blackouts. I know I asked about exclusivity.

7           CHAIRMAN GRIFFITH: Exclusivity.

8           MR. SEIVER: I think this is starting to  
9 go beyond what I did on cross.

10          THE WITNESS: Well, the next line goes  
11 right to that.

12          MS. BEHAN: I can establish a --

13          CHAIRMAN GRIFFITH: It's overruled.

14               Go ahead.

15          BY MS. BEHAN:

16          Q       But first of all, before you read that,  
17 first what is the relationship between blackouts and  
18 exclusivity?

19          A       Blackouts are the way, in sports at least,  
20 that you effectuate the exclusivity.

21          Q       Okay. Can you now read what Direct TV  
22 says about sports blackouts?

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1           A       I'm picking up from the second line about  
2       the blackouts. "They are imposed to protect the in-  
3       market rights holders on an out-of-market or national  
4       broadcast fee."

5                       Two, "Regional sports networks do not  
6       provide professional sports from outside their local  
7       coverage areas. They do provide professional sports  
8       within their own regions. Of course, they also  
9       provide non-professional sports events."

10                      Point 3, "Customers must have a phone line  
11       continuously connected to their DSS decoder to receive  
12       sports programming." I'll interject that the reason  
13       for that is that that way we can make sure that the  
14       box is actually located at the location, at the zip  
15       code in the area code, that the people say it is in.  
16       That prevents people from registering in a different  
17       zip code and thereby defeating the purpose of the  
18       blackouts.

19           Q       Okay. Mr. Desser, I think that's  
20       sufficient for now. Now, do these provisions apply to  
21       the sports programming that is subject to compulsory  
22       license under 119?

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1 A No, they do not.

2 Q Okay. And is Direct TV then specifying  
3 which packages of programming it does apply to?

4 A It specifically talks here about the NBA  
5 league pass, among other things.

6 Q Where does it talk about that? Are  
7 they --

8 A That's --

9 Q Is there a list anywhere?

10 A Well, the next several pages, actually, go  
11 on to list generally what the case is for professional  
12 sports, differentiates national rights and local  
13 rights, and then goes on, beginning on page 19, to  
14 talk about the various packages that are offered, the  
15 NFL package, the NBA package, what's in them, what you  
16 get, what you don't get.

17 Q Okay. And then, finally, can you explain  
18 to me -- or can you explain to the panel -- your view  
19 about what the relationship is between your ability to  
20 negotiate in a free market and your ability to use  
21 exclusivity effectively?

22 A Exclusivity is one of those things that

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1 the purchasers of our programming are accustomed to  
2 demanding from us, as is the case with NBC. NBC  
3 expected to receive a promise from us that we wouldn't  
4 go and license CBS or ABC. In fact, we can't license  
5 CBS or ABC or FOX to carry any NBA games during the  
6 term of this agreement. That was something very  
7 important to NBC. It was something NBC expected, just  
8 as they expect with many other kinds of programming.

9 It's one of the central elements when I  
10 negotiate a programming agreement. There are, you  
11 know, a handful of key deal points, and one of them is  
12 almost inevitably and invariably exclusivity.

13 Q Okay. And is that a point that you are  
14 able to raise at all with the Satellite Carriers in  
15 programming this license or the compulsory license?

16 A No. I lose all control over the  
17 programming as a result of that license. They can  
18 take it. They can sell it. They can package it.  
19 They can violate the exclusivity that I have otherwise  
20 granted to third parties. And there is not much I can  
21 say about it.

22 MS. BEHAN: Thank you very much.

1 CHAIRMAN GRIFFITH: Okay. Thank you.

2 Anything further?

3 MR. SEIVER: I have to apologize, Your  
4 Honor, but I do have a few questions if it's all  
5 right. I don't think it will take more than five  
6 minutes. I hope.

7 CHAIRMAN GRIFFITH: All right. Five  
8 minutes.

9 MR. SEIVER: And also, for purposes of the  
10 record, I have Exhibit 8, the Carriers Exhibit 8 that  
11 was copied.

12 CHAIRMAN GRIFFITH: Thank you.

13 RECROSS EXAMINATION

14 BY MR. SEIVER:

15 Q Mr. Desser, I guess you are somewhat of a  
16 cable copyright expert, then, given your response to  
17 Ms. Behan.

18 MS. BEHAN: I object to that. It's  
19 argumentative.

20 CHAIRMAN GRIFFITH: The objection is  
21 sustained and it's stricken.

22 BY MR. SEIVER:

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1 Q Mr. Desser, you testified about the 3.75  
2 rate?

3 A Yes.

4 Q And you know that that exists for cable  
5 copyright?

6 A Yes.

7 Q Do you know whether it always applies to  
8 the third signal that's carried?

9 A I think there may be some exceptions. I  
10 have some vague recollection about the exceptions, but  
11 I can't really illuminate them.

12 Q Do you know whether it applies to all  
13 cable systems?

14 A I believe it only applies to what are  
15 called Form 3 cable systems, which are the larger  
16 cable systems.

17 Q Do you know whether it applies to  
18 grandfathered signals?

19 A I don't know.

20 Q Do you know whether it varies by market?

21 A I don't know.

22 Q Do you know how many cable systems pay a

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1 3.5 percent penalty as we call it?

2 A 3.75, do you mean?

3 Q I mean 75, I'm sorry.

4 A No, I don't know off hand.

5 Q And when royalties are assessed on the  
6 percentage of basic revenues -- we were looking at Mr.  
7 Trautman's exhibit. We saw that cable operators have  
8 a broadcast basic package that was priced at \$9.90.  
9 We were looking at Superstar's package that had cable  
10 networks as well as the superstations and other  
11 programming, am I right. Is that yes?

12 A I didn't follow the question.

13 Q When we looked at the cable operators'  
14 programming lineup, there is a broadcast basic for  
15 \$9.90, and I was asking you about copyright.

16 A In that particular example from Denver.

17 Q Right. And the next table which was --  
18 no, Table A-3, which was Superstar's lineup, that  
19 particular lineup included considerably more signals  
20 than just broadcast signals, am I right?

21 A Yes, there are other signals there as  
22 well.

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1           Q       And would it be fair to say that if  
2       Superstar were paying a percentage of royalties on a  
3       broadcast basic tier like cable does that they would  
4       design a tier that had broadcast signals on it for  
5       purposes of assessing copyright, so they don't have to  
6       pay that copyright percentage on cable networks like  
7       the cable operators do?

8           MS. BEHAN: I object to the question. I'm  
9       not sure I understand it myself.

10          MR. SEIVER:     Do you understand the  
11       question?

12          CHAIRMAN GRIFFITH: She says she doesn't  
13       understand it. So do you want to repeat the question,  
14       please?

15          BY MR. SEIVER:

16          Q       Mr. Desser, do you understand that under  
17       the cable copyright license, as it is applied, cable  
18       operators only have to pay the percentage of revenues  
19       that are gained on the tier that contains the  
20       broadcast signals. Am I right?

21          MS. BEHAN: I'm going to object to the  
22       question. He is calling for a legal interpretation.

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1 But again, he can answer as to his understanding, if  
2 he has one.

3 MR. SEIVER: He has provided --

4 CHAIRMAN GRIFFITH: Overruled.

5 Go ahead.

6 BY MR. SEIVER:

7 Q Did you understand my question?

8 A I think so.

9 Q And the answer is?

10 A If I can now remember the question --

11 Q Would you like for me to -- I'll repeat  
12 it.

13 A Please repeat it. I'm sorry.

14 Q Do you understand that cable operators,  
15 when they pay their copyright under 111, which is a  
16 percentage of revenues, it's the percentage that is  
17 applied to the revenues they gained from the lowest  
18 level of service, or tier of service, that contained  
19 broadcast signals?

20 A I'm not sure that it's necessarily solely  
21 on their lowest level of service, but I think it's on  
22 the level of service that does contain those signals.

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1 So it could be on a broader array of signals,  
2 depending on where they choose to put them in the  
3 tier.

4 Q So your understanding would be for cable  
5 operators, to minimize copyright royalty payments,  
6 they would design a tier with broadcast signals on it  
7 and not other high-priced cable network signals that  
8 would generate more revenues unrelated?

9 A That's a strategy that they could go for.

10 Q And you would assume, if that particular  
11 royalty scheme applied to the satellite carriers, that  
12 they would so similarly design a kind of broadcast  
13 basic tier on which the percentage of revenues would  
14 apply, limiting the number of cable networks?

15 MS. BEHAN: I'm going to object.

16 CHAIRMAN GRIFFITH: I didn't hear you.

17 MS. BEHAN: I'm objecting to the question.

18 I think it is unfair, misleading, and asks him to  
19 assume a number of things in the question.

20 CHAIRMAN GRIFFITH: The only thing is, he  
21 is an expert. If he has an opinion, I think he can  
22 express it.

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1 Do you have an opinion on that?

2 THE WITNESS: I have a general opinion,  
3 sure.

4 CHAIRMAN GRIFFITH: All right. Let's hear  
5 it.

6 THE WITNESS: Superstar, for example, has  
7 a wide variety of different packages that they have  
8 designed. Some include, you know, maybe just movie  
9 services, for example. They even have a package that  
10 just -- that they call the sports package, which just  
11 includes sports-related services, including a whole  
12 bunch of superstations -- KTLA, WGN, WPIX, WSBK, WTBS,  
13 WWOR, ESPN, ESPN-2, and Satellite Sports Network. So,  
14 you know, yes, there is the opportunity to package  
15 those in a variety of different ways.

16 MR. SEIVER: Thank you.

17 BY MR. SEIVER:

18 Q Ms. Behan just explored with you briefly  
19 about this control issue and exclusivity. Nobody is  
20 forcing you to sell games to superstations, are they?

21 A We could elect not to sell our games on  
22 television and not to sell them on broadcast stations,

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1 and, therefore, eliminate the problem of retransmitted  
2 signals. But that's a rather severe remedy for this  
3 particular problem. That's kind of a cut-off-your-  
4 nose-to-spite-your-face kind of remedy.

5 Q So you accommodated that by -- we  
6 discussed before having that viewer surcharge that you  
7 applied to -- was it WTBS for their national viewage?

8 A We --

9 Q Tax, surcharge, whatever it was called.

10 A Well, we had -- we enacted some  
11 legislation that involved a tax or a fee for  
12 distributing superstations. That never actually came  
13 to fruition because of the litigation. But at the end  
14 of the day, we reached a licensing agreement with WGN.

15 Q And when NBC buys the exclusive rights  
16 that I think you were talking about with Mr. Ossola,  
17 as well as Ms. Behan, NBC says, you know, "We've got  
18 the exclusive right to that game." You don't, then,  
19 license it to anybody else, superstation or anybody  
20 else, right?

21 A Not within the U.S. market, no.

22 MR. SEIVER: Very well. That's all I

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1 have.

2 CHAIRMAN GRIFFITH: All right. Thank you.

3 MS. BEHAN: I have nothing further.

4 CHAIRMAN GRIFFITH: Okay. Mr. Desser, you  
5 are free to go, sir. Thank you very, very much.

6 THE WITNESS: Thank you very much --

7 CHAIRMAN GRIFFITH: Appreciate it.

8 THE WITNESS: -- for your time.

9 CHAIRMAN GRIFFITH: All right.

10 THE WITNESS: Happy to answer any  
11 questions you might have.

12 (Whereupon, the witness was excused.)

13 MS. BEHAN: If the panel does have any  
14 questions, I know often people ask questions --

15 CHAIRMAN GRIFFITH: No. We do not.

16 I have some questions of you, though,  
17 before you leave. What time do you want to start  
18 Monday morning? How many vote for 10:00?

19 (Whereupon, at 5:43 p.m., the proceedings  
20 in the foregoing matter went off the  
21 record.)

22

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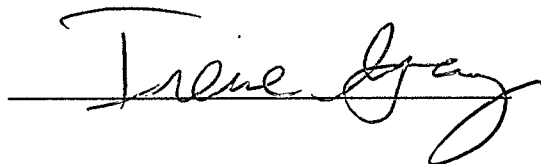
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                                  Docket No. 96-3 CARP-SRA

Before:                   Library of Congress  
                                  Copyright Arbitration Royalty Panel

Date:                     March 14, 1997

Place:                    Washington, DC

represents the full and complete proceedings of the  
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